

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

—
EASTERN DISTRICT, MAY TERM, 1822.
—

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**THE STATE vs. NEW-ORLEANS NAVIGATION
COMPANY.**

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The court having heard the plaintiffs' and defendants' counsel, at March term, *ante* 38, 187, gave time to the former to reply; which he afterwards declined.

Congress have power to govern the territories of the united states And may establish territorial legislature.

MARTIN, J. delivered the opinion of the court. The attorney-general has sued out a writ of *scire facias*, to avoid the charter or act of incorporation of the defendants, on the ground that it is absolutely void, or that they have incurred a forfeiture of it by nonfeasance.

The governor and legislative council of the Orleans territory had power to grant the charter of the New-Orleans Navigation Co.

There was judgment in favor of the defendants, and the state appealed.

The charter is not affected by any law of congress, anterior or posterior to its date Louisiana is a member of the

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union, on a footing with the original states, and is not bound by any condition subsequent, annexed to her admission.

Her counsel denies the political existence of the legislative body, who granted the charter, and urges that it is inconsistent with the constitution and laws of the united states.

He boldly contests the power of congress to govern the territories, and contends that, admitting they possess, they can not delegate, it.

On this part of the case, it would perhaps suffice to repeat what we said a few years ago, when pressed to declare that the office of the special administrator had no legal existence.

"The governor construed his commission as extending to the exercise of legislative powers, in this and similar instances, in which he never was censured. The judiciary of the late territory sanctioned his conclusion, by sustaining suits and giving judgments, in several instances, in favor of that officer. Till the institution of the present suit, no doubt appears to have been harbored of the legality of the office. Many estates have been settled by the special administrator. It would be attended with monstrous consequences, if by declaring that the office never legally existed, this court were to annul the various transactions of the several incumbents who filled it."

"When, in the case of *Stewart vs. Laird*, 1 East'n District. Cranch, 309, a judgment was sought to be reversed, on the ground that the judges of the supreme court of the united states had no power to sit as circuit judges, without having been appointed as such, (in other words, that they ought to have received distinct commissions for this purpose) that court thought it sufficient to observe that practice and acquiescence for a period of several years, commencing with the organization of the judicial system, afforded an irresistible answer, and had indeed fixed the construction; that it was a cotemporary interpretation of the most forcible nature, and this practical exposition was too strong and too obstinate to be shaken or controlled. They concluded the question was now at rest, and ought not to be disturbed." *Rogers vs. Beiller*, 3 *Martin*, 669.

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A majority of the members of this court sat for years, as judges of the late territory. The very acceptance of their commissions was a decision, on their part, that the offices had a legal existence. Had they been afterwards convinced of the illegality of their offices, they could only have declared it, by descending from their seats: for, if they were not legal

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magistrates, they had no capacity to say so. It was their misfortune to be at several times called upon to exercise the most solemn and awful parts of their functions—to pronounce sentence of death. Can they harbor the idea of having done this without any legal authority?

Can the present court say that they have, for several years past, disposed of the fortunes of their fellow-citizens, according to the acts of a legislature, which never had a legitimate existence.

If any doubt could be entertained, it would certainly vanish on consideration of the part of the constitution of the united states, to which the counsel for the state has drawn our attention:—

“Congress have the power to dispose of and make all needful rules and regulations, with regard to the territory, or other property of the united states.”

Now a very needful regulation, with regard to the land of the united states, considered as the subject of property, is to provide for its settlement.

The individuals who are to settle on it, must be designated, and when there must

have some kind of government given them. Otherwise, if any individual have a right to remove thither, and those thus assembled can establish a government of their own, independent of and uncontrolled by the authority of the united states—would not the acquiescence of the latter be an implied relinquishment of their title? Would not a state thus erected, be at liberty to decline being incorporated into the union?

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The legislature of every state relieves itself from the burden of making, and the details of, particular laws, necessary or useful for the individual government of cities, towns, &c. by clothing aldermen, selectmen, trustees, commissioners, &c., under certain restrictions, with a portion of its authority. To congress, a relief of the kind, with regard to the territories of the united states, was essential. Nearly one fourth of the year was requisite for the expedition of the legislative concerns of the late territory of Orleans. It cannot be imagined that congress, a very numerous body, sitting at the distance of fifteen hundred miles, with one delegate only *from that* territory, could have performed the same labour in the

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same time: and when it is considered that there were half a dozen of territories, it will be seen that congress could not have legislated for these, even if they sat during the whole year, and bestowed their whole attention exclusively on the framing of laws for the territories.

We conclude that the power of making all needful rules and regulations, in regard to the territory of the united states, implies that of providing a government for those who inhabit it; and that, as in this respect, the constitution has imposed no restraint, congress well might establish such territorial, legislative, executive, and judicial departments, as to them appeared proper.

The grant of the defendants' charter appears to have been within the scope of the powers, vested by congress in the governor and legislative council of the territory of Orleans: for these were expressly extended to all rightful subjects of legislation.

The restriction which congress imposed was that the territorial laws be not inconsistent with the constitution and laws of the united states; that they lay no person under any re-

straint, disability or burden, on account of religion; that they do not dispose of the soil, tax the land of the united states, nor interfere with land claims.

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The governor was directed to report the laws to the president of the united states, that they might be laid before that body, on whose disapprobation they were to cease having any validity.

We are next to enquire whether the charter violates any of these restrictions.

The counsel for the state, urges that it is inconsistent with the provisions of the 8th, 9th, and 10th sections of the first article of the constitution of the united states.

"All duties, imposts and excises shall be uniform throughout the united states." *Sec. 8.*

"Congress shall have power to regulate commerce with foreign nations." *Id.*

"Vessels, bound to and from one state, shall not be obliged to pay duties in another." *Sec. 9.*

"No state shall, without the consent of congress, lay any duties of tonnage." *Sec. 10.*

The duties, mentioned in the 8th section, are therein described to be those which are laid, "to pay the debts, and provide for the

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general welfare," to fill the public coffer; not retributions, like the toll permitted by the charter, to be received by individuals (on account of some improvement made by them, at their own costs) and paid by those who are benefited thereby.

As early as 1790, *i. e.* at the first congress, after the adoption of the federal constitution, that body gave its assents to—

A law of the state of Rhode Island, to incorporate certain persons, by the name of the River Machine Company.

A law of the state of Maryland, to appoint wardens of the port of Baltimore, and an act supplemental thereto.

A law of the state of Georgia, laying and appointing a duty of tonnage, for the purpose of clearing the river Savannah, and removing wrecks and other obstructions therein. 2 L. U. S. 181, 192, 258 and 532.

Neither of these laws are within our reach; but their titles shew that probably all (and certainly the last) were for laying a retribution of the same nature, as that established by the defendants' charter. Laws for the improvement of a water course, by means of a duty or toll, to be levied on vessels afterwards

using it. Yet neither of the legislatures of Rhode Island, Maryland or Georgia, nor that of the union, considered these laws as inconsistent with the constitution of the united states, because the duties laid, are not uniform throughout the united states, interfere with the exclusive power given to congress to regulate commerce, and are to be paid in one state, by vessels coming from another.

These state laws were continued, and the continuing laws assented to, in 1793, 1798, 1800 and 1808.

In 1798, congress gave their assent to a law of the state of Massachusetts, incorporating certain persons to keep in repair a pier at the mouth of Kennebunk river, and providing a duty for their reimbursement. 3 L. U. S. 35.

In 1802, congress assented to a law of the state of Virginia, relating to the navigation of Appamatox river. *Id.* 474. And in 1804, to a similar one, in regard to James river. *Id.* 586.

In 1804, to a law of the state of South-Carolina, authorising a duty of not more than six cents per ton, on all ships and vessels of the united states, returning to the port of Charleston from a foreign port. *Id.* 10. The act was revived in 1809.

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In 1805, a law of the state of Maryland was assented to, for the collection of a duty of one cent per ton, on all foreign vessels, coming into the port of Baltimore, to defray the expences of quarantine regulations. *Id.* 640.

In 1811, the same assent was given to a law of the state of Georgia, establishing the fees of the harbour-master of the port of Savannah. *Id.* 348. The act was revived in 1813.

These acts, to which our attention has been drawn, by the counsel for the state, are conclusive evidence of the early, deliberate and continued opinion of the national legislature, and of those of so many of the most important members of the union (Massachusetts, Rhode Island, Maryland, Virginia, South-Carolina and Georgia) that the navigation of water courses may be improved, and the necessary funds procured or reimbursed, by a duty raised on vessels navigating it, commensurate with the object, *with the assent of congress*, without violating any of the parts of the constitution of the united states.

But it is urged, that the duty which the defendants' charter authorises them to collect, has not been laid *with this assent*.

It does not necessarily follow, that because the constitution requires this assent to a state, it is essential to a territorial, law.

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The state laws are passed without the agency, and are beyond the control of the government of the union. Those of the governor and legislative council were passed by an officer, and an assembly composed of members, appointed by the president of the united states, and ceased to be of any force as soon as it pleased congress to express this disapproval.

The ones were therefore to be presented for the assent of congress, before they went into operation; and this because, after they were in vigor, they were out of the control of congress. The others were not to be presented for the sanction of congress, by an explicit assent, but submitted to their consideration and silent acquiescence, which left to that body the free exercise of the right it had reserved, of annulling them at will.

But, let us view the case in the light in which the counsel for the state is pleased to present it to us; as if the assent of congress was equally necessary to the territorial, as to a state, law.

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The constitution does not require an *express* assent, and the counsel for the defendant urges, that as to their charter, an *implied* one is necessarily to be inferred.

This instrument bears date of July, 1805, a short time before the beginning of the first session of the ninth congress, during which it must, according to the provision cited, have been submitted to that body. The session ended without the disapprobation of the charter.

The silence of the national legislature was a manifestation of its will, that the act should provisorily continue in force.

The same congress, at its second session, on the 3d of March 1807, manifested, by procuring to the new corporation, the gratuitous conveyance of a requisite strip of land, their wish that it should continue its operation, by prolonging the canal, which they were improving, from its basin to the Mississippi; an object, which the succeeding congress appear to have had so much at heart, that they appropriated \$25,000 towards the attainment of it.

In 1814, the fourteenth, and in 1816, the fifteenth congress gave the corporation new pledges of their countenance and favor, by the grant of a lot of land, in each of these years.

Repeated laws of congress, expressly adding to the means provided by the territorial legislature, for the completion of the object, for which the defendants were incorporated, may well be considered as an avowal that congress did not disapprove the law, which gave them a political existence.

The court *a quo* considered it so, and concluded that the charter had the implied assent of congress—a conclusion in which we readily concur.

It is further urged, that if the charter be not inconsistent with any part of the constitution of the united states, it is however so, with several acts of congress, viz. the acts of March 27th, 1804, and March 2d, 1805, anterior, and that of February 20th, and March 3d, 1811; and April 8th, 1812, posterior, to its date.

In the act of 1804, (quoted by the counsel for the state, *ante* 79) 3 *L. U. S.* 626, we have sought in vain for the provision which the counsel recites. We have, however, found it in an act of the 3d of March 1803, to which the act of 1804 is a supplement. *Id.* 553, *sec.* 17. It is there said, “that all navigable rivers, within the territory of the united states, south of the state of Tennessee, shall be deemed to

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be, and remain public highways." The date of the act being anterior to the treaty of cession, Louisiana made then no part of the territory of the united states; it is not therefore clear that the provision extends to it.

The act of 1805 extends, with some modifications, the *ordinance* of 1787, to the territory of Orleans. One of the provisions of this instrument is, "that all the navigable waters leading into the St. Lawrence and the Mississippi, and the carrying places between the same, shall be common highways, and for ever free, as well to the inhabitants of the territory, as the citizens of the united states, or those of any other state that may be admitted into the confederacy, without any impost, tax or duty therefor."

The counsel for the defendants has shewn that neither the character of a public highway, nor its freedom is incompatible with its subjection to some rule.

Freedom does not preclude the idea of subjection to law. Indeed it pre-supposes the existence of some legislative provision, the observance of which insures freedom to us, by securing the like observance from others. The freedom of navigation, stipulated for

other citizens of the united states, is that which those who inhabit the territory enjoy.

As a public highway, the river may be freely navigated by either, up and down, for the conveyance, for hire, of persons and property. Not so across, at such points where ferries are established by law, nor within a certain distance above or below. The freedom, stipulated for by the ordinance, is not so absolute, as to be inconsistent with submission to ferriage laws, securing to the citizens residing within or without the territory, the convenience of finding, at suitable places, at all times, and for a fixed compensation, the means of crossing.

Nor with quarantine laws, which forbid the advance in the midst of the shipping, anchored before a city, of vessels having, or even suspected to have on board, persons labouring under a contagious disease, to the danger and terror of its inhabitants.

Nor with a submission to pilotage laws, which, compelling, or inducing a pilot to venture at a great distance from a dangerous coast, to afford his skilful aid to vessels, oblige a master, who declines his services, to make him some compensation for his labour and risk.

2 *Martin's Digest*, 408. n. 7.

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Nor with a submission to a law, which provides a compensation for the labour and expence, bestowed by an individual or corporation, on the improvement of the navigation of a water course, attended before with difficulty and danger, to be paid by those, who by such means navigate it with ease and safety.

But it is stated, the ordinance stipulated not only for the freedom of navigation, but also for an exemption from any *impost, tax, or duty* therefor.

These words, we think, must be confined to the idea which they commonly and ordinarily present to the mind ; exactions to fill the public coffers, for the payment of the debt, and the promotion of the general welfare of the country ; not to a retribution, provided to defray the expences of building bridges, erecting causeways, or removing obstructions in a water course, to be paid by such individuals only who enjoy the advantage, resulting from such labour and expense.

We conclude, that the district judge correctly declined to consider the charter of the defendants, as inconsistent with any of the acts of congress, passed before its date.

The first act, passed since the date of the

charter, which is said to be incompatible therewith, and consequently is held to repeal it, is that of the 20th of February, 1811.

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Congress in this act, were pleased to impose as a condition *precedent*, of the admission of Louisiana into the union, that a clause should be inserted in an ordinance of the convention, which framed the state constitution, providing, "that the river Mississippi, and the navigable rivers and waters leading into the same, or into the gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state, as to other citizens of the united states, without any tax, duty, impost, or toll therefor, imposed by the said state." 4 L. U. S. 329.

The next act, is that of the third of March following, by which congress directs, that all the navigable rivers and waters of the territory of Orleans, shall be, and forever remain public highways. *Id.* 361.

The last is that of April 8th, 1812, by which the provisions of the clause, the insertion of which had been proposed as a condition *precedent*, are made conditions subsequent—of the admission of the state into the union. *Id.* 402.

The admission of the state into the union,

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as soon as possible, was a matter of right, secured by the treaty of cession. To it no condition, either precedent or subsequent, could be imposed by congress.

To an anticipated admission, that body could propose conditions precedent, which the people might accept or reject.

Thus, before the population of the intended state amounted to 60,000 free persons, the number, which, under the ordinance, entitled the people to admission as a state, congress thought fit to propose an anticipated admission, on certain conditions and restrictions, which were accepted, with some modification, by the convention.

For example, congress proposed that a constitution should be framed, "containing the fundamental principles of civil and *religious* liberty." One was framed containing *no* principle of religious liberty. The only part of it in which religion is noticed, is the 22d section of the 2d article, providing that no clergyman, priest or teacher, of any religious persuasion, society or sect, shall be eligible to the general assembly, or to any office of profit or trust; a *restriction* on, rather than a *recognition* of the principles of religious liberty.

Congress proposed that *ALL the records of the state, of every description*, should be preserved in the language in which the constitution of the united states is written. The provision was confined to the *PUBLIC records of the state*.

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The proposed clause, in the ordinance of the convention, was absolutely neglected.*

* Since the delivery of this opinion, the reporter has been informed by Mr. Fromentin, who was one of the commissioners of the state, to carry the constitution to congress, that no ordinance of the convention was sent to that body. On an examination of the papers and journal of the convention, it appears that the form of an ordinance was reported by a committee, transcribed on the records, and the consideration of it postponed; but it is believed no ordinance was actually passed.

The copy from which the document, 1 *Martin's Dig.* 132, was printed, was furnished by the late governor Claiborne, as that of the ordinance; the original, in his opinion, having been sent to congress, with the constitution.

The form reported by the committee, was drafted on the copy of an act of congress, of February 20th, 1811, printed by the public printer, (Mr. Thierry) according to the directions of the general assembly, with the acts of the session. In the copy thus printed, the clause, which relates to the free navigation of the Mississippi, was accidentally omitted. The error crept into the Digest; the pamphlet acts, printed by the public printer, having been used by the printer of that work, by the directions of the person employed by the legislature to prepare it.

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The *absolute* acceptance of the propositions of congress, being refused, congress might have declined to receive the *qualified* one, and forbore for the moment, to admit the state into the union. This, they did not do.

They impliedly waved the absolute compliance with the proposed terms, relating to religious liberty, and the language of the records, by approving the constitution, and admitted the state into the union, with a proviso, that the former terms should be taken as a condition, upon which Louisiana was incorporated into the union.

In the treaty of cession, an *unconditional* incorporation was stipulated for. According to the ordinance, admission was promised, *on an equal footing with the original states*.

Now that the state is incorporated into the union, she must be so *on an equal footing*, free from any condition *subsequent*, to which the people did not agree.

She is not admitted on an equal footing with the state of New-York, if she must allow the free navigation of the Mississippi, to the citizens of that state, while her citizens are not allowed that of the Hudson; nor if they be, while she must give a parchment security, while the state of New-York gives none.

It cannot be said, that by putting the state government into operation, the people accepted the conditions *subsequent*, annexed by congress to the admission of the state. They were not called upon to consider them.

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The president of the convention, who issued his proclamation for holding the elections, had no authority to accept any condition, and could not bind the people; neither could the officers, who presided at the elections. A single vote, in a parish, would have been sufficient to elect a senator or a representative. Had the people determined to decline putting the state government into operation, by refusing to elect members of the general assembly, they could not have effected their purpose, without an almost absolute unanimity.

We conclude, that neither the existence of the defendants, as a corporate body, nor any of their rights, under the charter, is affected by any act of congress, passed since its date.

It does not appear to us, that there has been any alienation of the soil, nor that the bayou has ceased to be a public highway.

The court *a quo* acted correctly in declin-

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ing to declare that the defendants' charter is null and void.

The defendants have shewn that the whole of their capital has been fairly expended in improving the navigation of the bayou, clearing the canal and basin.

There is no evidence before us of the probable expenses that would attend the continuing the canal from the basin to the Mississippi.

They cannot command one cent of the \$25,000 appropriated by congress. This sum is placed at the entire disposal of the president of the united states.

The court *a quo* does not appear to us, to have erred in refusing to pronounce that the defendants' charter has been forfeited by non-feasance.

It escaped its notice, that the state can never be condemned to pay costs in her own courts, and it erred in giving judgment for the defendants, *with costs*.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoid-

ed and reversed, and this court proceeding to give such a judgment, as, in their opinion, ought to have been given below,

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It is ordered, adjudged and decreed, that there be judgment for the defendants.

WARD vs. BRANDT & AL. SYNDICS.

APPEAL from the court of the first district.

Grayson, for the plaintiff. The petition of David L. Ward, the appellant, was originally preferred against J. Brandt & Co., composed of John Brandt and Henry Foster, of New-Orleans, and James Johnson and William Ward, of Kentucky, to recover the sum therein stated to be due from the latter to the former, with interest, damages and costs, according to accounts, made part of, and filed with the petition, signed with the name of J. Brandt & Co., by Henry Foster, who was thereunto authorised, and which accounts, on the 1st of September, 1820, for valuable considerations, were assigned to the plaintiff, and also what further sums might be due from J. Brandt & Co. to James Johnson, and James & Johnson.

A partnership, "to do commission business as factors, in the city of New-Orleans," is not a particular partnership.

It is not necessary that the style of such partnership should contain the name of each partner.

The partners, in an ordinary commercial partnership, are bound in *solida*, and cannot prove or be paid their respective claims, until the partnership debts due to other creditors, are paid.

Debts other than those arising from consignment, may be proved on insolvency against a commission

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house in this
city.

Private debts cannot be set off against partnership demands—hence where A, was partner of a commercial firm in Kentucky, & of one in New-Orleans, held, that in case of insolvency of the latter, the house in Kentucky, might prove its debt, although one of its partners was responsible to the creditors of that which had failed.

Persons sending property to be sold on commission, have not a privilege for the debt which arises from the goods being sold, in case the proceeds cannot be traced and identified, in the insolvent's hands.

The law gives mortgage on the estates of those who intermeddle in the administration of absent per-

The accounts made part of, and filed with the petition, are—

An account between James Johnson, creditor, and J. Brandt & Co. debtors, exhibiting a balance due from the latter to the former, on the 18th of April, 1820, of 43097 dollars 7 cents, subscribed J. Brandt & Co., by Henry Foster. At the foot of this account, a charge is made by J. Brandt & Co., against James Johnson, of 15080 dollars, for Rochelle & Shiff's notes, delivered to Robert J. Ward; leaving a balance due James Johnson of 28017 dollars 7 cents. There is an assignment of, and upon the account, and of what might be further due to David L. Ward, for value, dated 1st September, 1820, subscribed, "James Johnson."

An account between E. P. Johnson & Co. and J. Brandt & Co., shewing a balance in favour of the former, of 5131 dollars, 45 cents, on the 14th of May 1819; signed, "J. Brandt & Co., by Henry Foster." And at the foot of the account, is an assignment thereof, from E. P. Johnson & Co., to D. L. Ward, for value, dated the 1st September, 1820, subscribed, "E. P. Johnson & Co."

An account between William Ward, and

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John Brandt & Co., shewing a balance due to East'n District.
Wm. Ward, on the 19th May, 1819, of 2680 dol-
lars 50 cents, subscribed, "J. Brandt & Co., by
Henry Foster." And at the foot of which
account is an assignment thereof, for value,
from William Ward, to David L. Ward, dated
1st September, and subscribed, "W. Ward."

And an account between Wards & Johnson,
and John Brandt & Co., exhibiting a balance
due the former, of 14287 dollars 45 cents, on
the 14th June, 1819, subscribed, "J. Brandt
& Co., by Henry Foster." And at the foot of
the account, is an assignment of it, to David
L. Ward, and of what might be further due,
dated 1st September, 1820, signed, "James
Johnson, Wm. Ward."

The answer of John Brandt and Henry Foster,
objects : That John Brandt, Henry Foster,
William Ward and James Johnson were
partners, as commission merchants, in New-Or-
leans; that they obtained a respite of one, two
and three years for the payment of their debts.
That not more than one year had elapsed,
and that two-thirds of their debts remain-
ed unpaid. And that since the exhibition of
the state of their affairs, by which it appeared

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sons property,
not on those
who administer
it under autho-
rity from the
proprietor.

Query—whe-
ther the absent
persons, alluded
to, are not those
who are declar-
ed absent

In case of in-
solveny of the
partnership, if
two of the part-
ners owe the
firm; their debt
passes with oth-
ers to the credi-
tors, and the
other partners,
who are solvent,
have no right to
be paid out of
the debts, until
all claims on the
partnership are
discharged.

A mortgage
executed by two
of the partners,
after the acting
partners had
prayed for a re-
spite, which was
accorded, gives
no preference to
the mortgagees.

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that the said James Johnson and William Ward, then co-partners, and from whom the plaintiff derived his claim upon the respondents, were creditors of J. Brandt & Co., for the amount claimed by the plaintiff, losses had been incurred by J. Brandt & Co.; where, by the balances claimed by the petitioner had been greatly reduced. And that the claim of the petitioner, as set forth in his petition, must be deferred until all the debts of J. Brandt & Co. should be paid.

The answer of the syndics objects:—That there is nothing due from J. Brandt & Co. to the petitioner.

That if any thing be due to him, it is due by assignments, made by James Johnson, Wards & Johnson and Edward P. Johnson & Co.; that the firm of Wards & Johnson is composed of James Johnson, William Ward and the petitioner, and that the firm of E. P. Johnson & Co. is composed of E. P. Johnson and Wm. Ward, and that Wm. Ward and James Johnson, were partners of J. Brandt & Co., and bound *in solido* for all the debts of the firm. And that Wm. Ward and James Johnson are indebted to the respondents, as

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syndics, in a much larger sum of money than the amount demanded in the petition, *to wit.*

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100,000 dollars, which they plead, in compensation against the demands of the petitioner, who, as they say, knew the facts so set forth at the time said transfers were made. And they further object, that if any thing be due to the petitioner, the same is due by two of the firm of J. Brandt & Co. only, and must be postponed to the debts due to the creditors of said firm; that the property surrendered, will not be sufficient to pay the creditors of said firm, and that said property is all partnership property. And for further answer, they deny all the allegations of the petition.

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The plaintiff and syndics agreed upon certain facts, and prayed the opinion of the court upon the questions arising thereon, *to wit.*

1. That the late firm of J. Brandt & Co., was formed for the purpose of doing commission business, as factors in the city of New-Orleans, and was composed of John Brandt and Henry Foster, William Ward and James Johnson; that the business of said firm was transacted by John Brandt and Henry Foster, who resided in New-Orleans, whilst the said

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William Ward and James Johnson, resided as they did during the whole period of said partnership, in Kentucky.

2. That the said John Brandt and Henry Foster, in the name of said firm, on the 19th May, 1819, applied for a respite, and on the 28th of December, 1819, obtained the same, the first instalment to become due the 28th December, 1820, the record whereof, and all the proceedings relating thereto, are made part of the facts agreed, as aforesaid.

The said record contains a schedule of the debts acknowledged by J. Brandt & Co., to be due from them, at the time of their application for a respite, and which schedule, among the debts so acknowledged, shews to be due to William Ward, 2680 dollars 50 cents; E. P. Johnson & Co. 5131 dollars 45 cents; James Johnson, 35236 dollars 51 cents; Ward & Johnson, 18151 dollars 86 cents; Wards & Johnson, 1590 dollars, in all 62,790 dollars 31 cents; and to Lee White 512 dollars 50 cents.

3. That upon making application for said respite, the said partnership was dissolved, and shortly afterwards, *to wit*—on the day of May, in the year 1819, the dissolution aforesaid, was advertised in some newspaper printed in New-Orleans.

4. That at the times of applying for, and obtaining said respite, the said late firm was indebted to Lee White, in the sum of 512 dollars and 50 cents; to Edward P. Johnson & Co. in the sum of 5131 dollars and 45 cents; to William Ward, in the sum of 2080 dollars and 50 cents; to James Johnson, in the sum of 43,097 dollars and 7 cents; and to Wards & Johnson, in the sum of 14,287 dollars 45 cents, for the proceeds of consignments made by said creditors, respectively to said late firm; that the firm of E. P. Johnson & Co. consists of said Edward and William Ward, and that the firm of Wards & Johnson consisted of said David L. Ward, Wm. Ward and James Johnson; and upon settlement between the members of said latter firm, the said William Ward and James Johnson being found in arrear to said David L. Ward, the debt due to Wards & Johnson, as aforesaid, was adjudged to said David L. Ward, and assigned to him accordingly in consideration thereof.

5. That the said late firm of J. Brandt & Co., own real estate in the city of New-Orleans, and elsewhere, *to wit*; lands, lots and negroes.

6. That the said Henry Foster and John

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Brandt own real estate, *to wit* ; lands, lots and negroes.

7. That a parcel of land was sold in the city of New-Orleans, to Rochelle & Schiff, the property of the said John Brandt & Co. as aforesaid, for the sum of ; that the said James Johnson, received on account thereof, as follows, Rochelle & Schiff's notes, payable at 3, 4, 5 and 6 years from 22d April; one year for 4333 dollars 33 cents each, say 17,333 dollars 33 cents, deducting for interest 2253 dollars 33 cents, leaving the sum of fifteen thousand and eighty dollars, and for which said sum, the said John Brandt and Henry Foster, have given the said firm credit on the debt due to said James Johnson as aforesaid, leaving a balance of 28,017 dollars 7 cents.

8. That the agreement is not to preclude the said James Johnson, William Ward and Wards & Johnson from shewing further sums due to them, than as above, or to prejudice them, or said David L. Ward in the recovery thereof; the right of recovering, which, if any such there be, is nevertheless to be saved to them. Nor is it to preclude the syndics from shewing less to be due than above stated.

9. That the record of the proceedings in

the case of Robert Dyson and others, against East'n District.
John Brandt & Co. &c., be made part of the May, 1822.
facts agreed.

That record shews, that James H. Shepherd, WARD
Peter L. Sloane and John B. Bernard, vs.
were, BRANDT & AL
on the day of in the year 1821, SINDICH.
made syndics of J. Brandt & Co. and of J.
Brandt and Henry Foster.

10. That the debts due to said William
Ward, Wards & Johnson, E. P. Johnson & Co.
and James Johnson were assigned by them
respectively to said David L. Ward, on the
1st September, 1820, for valuable considera-
tions, then given by said Ward, and that the
debt due to said Lee White, has come to said
Ward for a valuable consideration by assign-
ment.

11. That on the 1st September, 1820, Wil-
liam Ward and James Johnson executed to
David L. Ward, a mortgage, recorded in the
office of the register of mortgages in this
city, on the 20th December, 1820, which is
made part of said facts agreed, and which
mortgage is attached to a petition of said
Ward in this court, against John Brandt, &c. to
secure the payment of fifty-six thousand dol-
lars, with interest, and which remains due and

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unpaid; and that the accounts or debts assigned to said David L. Ward, as above mentioned, remain due and unpaid.

12. That John Brandt and Henry Foster are, and were at the time of the respite aforesaid, indebted to the said late firm of John Brandt & Co., in a sum exceeding one hundred and forty thousand dollars, a part of which was laid out in lands, lots and negroes, in their separate names.

13. That the property surrendered by said John Brandt and Henry Foster; both partnership and private property, will be sufficient to pay the creditors of the late firm of John Brandt & Co.

14. That the plaintiff was conversant of the fact of John Brandt & Co. having obtained a respite.

15. That from the year 1815, 1816, or 1817, when the partnership was formed of John Brandt & Co., to the time of the advertisement of the dissolution before mentioned, the said William Ward and James Johnson, were well known in New-Orleans, to be partners of said firm.

16. The questions submitted to the court are:—

Whether the plaintiff is entitled to come in upon an equal footing with the creditors of John Brandt & Co., for a dividend upon all the above named debts assigned to him?

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If not so entitled, upon what part of said debts he is entitled to a dividend?

Whether said plaintiff is entitled to any privilege, and out of what funds, and in what order his debts are to be paid; and whether said debts ought to be paid out of the private estate or estates of John Brandt and Henry Foster, or either of them?

17. The admissions, contained in the 4th article of said agreement of facts, are intended to operate no farther than to effect a settlement of the foregoing questions, and are no further to conclude the parties as to the amount of said debts.

The district court decided that the creditors of J. Brandt & Co. should be preferred upon the funds of the partnership, to the plaintiff, except that as to the sum of \$5131 45 cents, for which, as assignee of E. P. Johnson, he should be paid rateably with the joint creditors of equal grade.

From this decision the plaintiff appealed.

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FOSTER.

1. His counsel insists that he is entitled upon the debts mentioned in his petition, and upon the debt assigned to him by Lee White, as stated in the agreement of facts aforesaid, to be paid out of the partnership fund of J. Brandt & Co. rateably with the creditors of said firm.

2. That if he be not so entitled upon the partnership funds, that he ought to be preferred to the partnership creditors upon the separate estate or estates of John Brandt and Henry Foster.

3. That the mortgage of the 1st Sept. 1820, from William Ward and James Johnson, to David L. Ward, and recorded in the office of register of mortgages in New-Orleans, on the 29th December, 1820, as stated in the 11th article of agreed facts, to secure to him the payment of 56,000 dollars, with interest according to the note of that date, of William Ward, James Johnson and A. M. Johnson, entitles the appellant, as mortgagee of William Ward and James Johnson, to their interests or portions in the lands and estates mentioned in said mortgage, out of which to be paid, as then creditor, the said sum of 56,000 dollars, with interest: and that said interests or portions have not passed to the syndics aforesaid.

I. The counsel urges that a partner may be a creditor of the partnership for the sums he has disbursed, &c. *Civil Code*, 394. And, *a fortiori*, he may be a creditor of the partnership for monies received by it upon consignments made by him on his special and private account. Such were William Ward and James Johnson for the private accounts assigned by them respectively, to the appellant.—4th article facts agreed.

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That William Ward and James Johnson are not bound, *in solido*, for the debts of J. Brandt & Co., and so may, as well as others, be creditors of the partnership.

Their co-partners, Brandt and Foster, were the administrators of the partnership, and resided in New-Orleans, whilst William Ward and James Johnson resided in a different place, namely, Kentucky—1st article of facts agreed. And therefore the latter are not bound by the agreements of the former.

The partnership of J. Brandt & Co. was not an ordinary commercial partnership; but was merely a partnership of industry and skill, to transact commission business, as factors, in New-Orleans—1st article of facts agreed.

But if the appellant be not entitled upon the partnership funds for all the debts stated

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in his petition, he is at least so entitled as to the debts in the names of Wards and Johnson, and E. P. Johnson & Co.

The account in favor of Wards & Johnson, though nominally due to them, that is to William Ward, David L. Ward and James Johnson, was in fact wholly due to D. L. Ward.—4th article of facts agreed.

Wards and Johnson, and E. P. Johnson & Co. were separate and distinct firms from J. Brandt & Co. A firm is an unit, or *quasi* individual, and the firms of Wards and Johnson, and E. P. Johnson & Co. were no parties to and had no interest or concern in that of J. Brandt & Co.

II. If the debts of the petitioner are to be postponed to the partnership creditors, upon the partnership funds of J. Brandt & Co.; for that reason they are to be preferred upon the private estate of J. Brandt and Henry Foster, the debtor partners.

J. Brandt and Henry Foster own real estate, *to wit*; lands, lots and negroes.—6th article of facts agreed.

The late firm of J. Brandt & Co. owns real estate in the city of New-Orleans, and elsewhere, *to wit*; lands, lots and negroes.—5th article of facts agreed. And the appellant

insists, that the interests or portions of the respective partners therein, are not held by them in commercial partnership: that though the partnership of J. Brandt & Co., as stated in the first article of facts agreed, be deemed an ordinary commercial partnership; yet that their lands, lots and negroes, do not enter into or belong to that partnership; that their partnership therein is private, special and particular, and the portions of the respective partners belong to their private estates. 11 *Mass. Rep.* 469.

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III. The appellant relies upon the mortgage from William Ward and James Johnson, of the 1st September, 1820:—

1. Because it was made upon a consideration then given.

It purports to convey their title to certain and any real estate of J. Brandt & Co. and the accounts or claims of James Johnson and William Ward against said firm, to pay a note of 56,000 dollars, of same date with the mortgage: and said accounts or claims were assigned to D. L. Ward, 1st September, 1820, for valuable considerations then given—10th article of facts agreed.

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That the consideration then passed is no where questioned or contested by the syndics.

2. Though J. Brandt & Co. be bankrupt, yet Wm. Ward and James Johnson are not so: and they had full power to mortgage any of their estates, for considerations present or past.

Their portions of the lands, lots and negroes of J. Brandt & Co. did not pass under the judgment of *cessio bonorum*, against J. Brandt & Co. to their syndics. That cession included only the effects belonging to the partnership of J. Brandt & Co. as stated in the 1st article of facts agreed, and not to the effects of any other partnership, though in the same name.

On the part of the appellant, I contend he is a creditor of J. Brandt & Co., and as such to be paid in concurrence with the other creditors of the firm, out of the partnership effects.

The firm of J. Brandt & Co. was formed for the purpose of doing commission business, as factors, in the city of New-Orleans, and was composed of John Brandt and Henry Foster, William Ward and James Johnson. The business of the firm was transacted by John

Brandt and Henry Foster, who resided in New-Orleans, whilst William Ward and James Johnson, during the whole period of the partnership, resided in Kentucky—1st article of facts agreed.

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A factor is an agent to buy and sell goods for others, for a certain allowance. 1 *Liv.* 68, *Lex. Mer. Am.* 388. He is not a merchant—merchants are those who buy things of others, with the intention of selling them again for the sake of the profits they thereby acquire.—2 *Partida*, 715, *tit.* 7. l. 1. A merchant buys and sells for himself: a factor for others—he is the agent of the merchant.

The partnership of J. Brandt & Co., to transact commission business as factors, was then a partnership to buy and sell for others, not for themselves.

The debts of a partnership must be limited by the nature and object of it. Those of a company of factors, can only arise upon monies or goods delivered to them to buy or sell for others. And if debts be contracted in the name of the company, by one or more of the partners, without special authority from the others, for purposes distinct from or beyond the intention of the partnership, they are not

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May, 1822. contracting partners solely.

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The debts claimed by the appellant, and originally in the names of Lee White, James Johnson, William Ward, Wards & Johnson, and E. P. Johnson & Co. accrued as and for the proceeds of consignments made by them respectively to John Brandt & Co.—4th article of facts agreed.

These are then the debts of the company of J. Brandt & Co. contracted within the scope and intention of the partnership.

All the business of the firm was transacted by John Brandt and Henry Foster, in New-Orleans—1st article of facts agreed. Their partnership with William Ward and James Johnson, residing in Kentucky, being for a limited object, gave them authority to bind them or the company so far and no further. It is therefore incumbent on those who prefer claims against the firm of J. Brandt & Co. to exhibit the nature of them, to shew how and for what they accrued, that it may appear whether the partnership be liable for them or not. In no instance has this been done, except by the appellant, and he is apparently the only legitimate creditor of the firm of J. Brandt & Co.

On the day of , in the year 1821, East'n District.
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John Brandt & Co. and John Brandt and Henry
Foster were declared bankrupt, and the ap-
pelees confirmed syndics for their creditors.
Vid. the case of Robert Dyson and others,
against them, made part of the facts agreed.

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When a partnership is bankrupt, the joint estate is to be first applied to the joint debts, and after they are paid, the surplus, if any, to the separate debts; and, *vice versa*, as to the separate estate.—*Dig. Mod. Ch. C. 54-90. 4 Ves. 840.*

In bankruptcy, joint creditors cannot touch the separate estate, till the separate creditors are satisfied.—*Dig. Mod. Ch. C. 57-122. 9 Ves. 124.*

Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors: each estate is applicable to its own debts.—*Dig. Mod. Ch. C. 69-169. 3 Ves. 240.*

In bankruptcy, the usual directions are to apply the funds respectively, the joint to the joint debts, the separate to the separate debts, the surplus of each to the creditors remaining on the other. *Dig. Mod. Ch. C. 69-90, 4 Ves. 240.*

Upon proof of a joint debt, no dividend can

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be taken under a separate commission of bankruptcy, till the separate creditors have received 20s. in the pound.—*Dig. Mod. Ch. C.* 69–181, 4 *Ves.* 837, *Vid.* also, 1 *Atk.* 227, *Day's Dig.* 69, 5 *Cranch*, 289, 4 *Ves.* 840.

Thus each estate is answerable, in the first instance only, for its respective debts. The estate which has received the consideration, and been benefited or enriched by it, is, if possible, to pay the equivalent that has been promised for it. The creditors of neither estate, until it is exhausted, can apply to the other, and then only for the surplus, after the payment of the debts due by it.

The debts above claimed by the appellant of J. Brandt & Co., as factors, are therefore to be paid him in the first instance, out of the effects of the firm, in concurrence with other debts due by them, as factors, if any such there be; and if those effects be insufficient, the residue of his debts are to be paid, at least, out of the surplus of the separate estate of the partners, after the payment of their private debts. But I hope presently to shew, that these debts of the appellant are privileged upon the separate estates of John Brandt and Henry Foster, and to be paid prior to their separate creditors.

As to the debts preferred by the appellant, as assignee of William Ward and James Johnson, it is objected that they accrued to members of the firm of J. Brandt & Co., and that they can have no satisfaction out of the partnership funds, unless there be a surplus after the joint creditors are paid. If there be no joint creditor besides the appellant, this objection can be of no consequence. But the objection, however plausible in itself, is not well founded. It is true, that a partner can sustain no claim against the partnership for his portion of stock or profits, whilst the partnership subsists, or until the joint debts are paid. Each one's portion of stock has been taken from his private estate, and appropriated to the partnership. The firm is an individual, and is proprietor of the joint stock, and of the profits which it may make, upon the faith of which it is enabled to obtain credit, and to contract debts. But if a partner lends money to the firm, to be repaid with or without interest; or if he makes disbursements for the firm beyond his share; or if the firm, as his agent, collects his money, to remit to him, or receives it on deposit, to keep for him, or receives his goods to sell for him, and

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remit to him the proceeds, or receives his goods on deposit, or on pledge, the firm is his debt, or for so much, and the debt so created belongs to his separate estate. I repeat it, this debt makes a part of his separate estate. I have shewn that the private estate is liable in the first instance to the payment of the debts due the separate creditors, and that the joint creditors can only touch the surplus, after they are paid. The partner must therefore be permitted to recover this debt of the partnership *pari passû*, with its other creditors, to enable him to pay his separate debts. When they are paid, if there be a surplus of separate estate, the joint creditors may go upon it. But it may be the only separate estate which the partner may possess, and the money or thing received of him by the partnership, may have been furnished him by his separate creditors, and the debt due for it, may now be the only source to which they can look for payment. The partnership fund has been enriched to the amount thereof, and in good faith, the firm therefor had engaged to pay what is now claimed by the partner for his separate creditors, and in consideration of which engage-

ment, credit was given to the firm by the partner. The money would not have been lent, the disbursements would not have been made, the goods would not have been pledged, deposited or consigned; but upon the expectation that the obligations thereby imposed upon the firm, would be fulfilled according to contract. The civil law expressly decides, that a partner may be a creditor of the partnership, for sums disbursed by him on partnership account. *Civil Code*, 392, art. 26. He may be a creditor of the partnership. He has then all the rights of a creditor, to demand his debt, sue for it, assign it over; in fine, to dispose of it in any way he may think proper, or as any creditor might do. Lord Hardwicke, the most distinguished of English chancellors, and who owed his greatness, in a high degree, to his knowlege of the civil law, decided, that a debt, due for money lent by one partner to the firm, ought to be considered as part of the separate estate of the partner; that a dividend should be allowed for it out of the partnership estate; and that the separate creditors of the partner were entitled to have as much as the dividend amounted to, together with the other sepa-

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rate estate of the partner, applied in the first place, to the satisfaction of their separate debts. 1 *Atk.* 227. *Cooke*, 531, 532. This decision is exactly in conformity with the principles above proposed, and supported by numerous authorities. It is true, the contrary has been elsewhere determined. *Cooke*, 532. But where decisions are contradictory, the court will follow that which is supported by principle.

But whatever doubt may exist in the English law, as to the claim of a partner upon the partnership, in the event of its bankruptcy, for advances or disbursements, upon partnership account; there is none, as to the claim of a partner or partners of a firm, who are distinct traders on their own account, and in that capacity deal with, and become creditors of the aggregate firm. In such cases the decisions are numerous and invariable, that proof may be made of the debt against the firm, in case of its bankruptcy, in the same manner as if it had dealt with strangers. *Lex. Mer. Am.* 641. *Cooke*, *B. L.* 538. *Wats.* 286.

This principle was adopted in a case where the members composing the two firms, though nominally different, were in fact the same.

Simon and Abraham Field, as co-partners, carried on trade as woolstaplers, in Southwark, under the firm of Simon & Abraham Field. They also carried on trade as woolstaplers at Leeds, under the name of William Barker & Co. But Barker was a servant of the Fields, and received from them a salary of £100 a year, and was not interested in the profits or losses of either of the concerns. The concerns were kept totally distinct, and in all matters of trade and dealing between the two houses, regular debits and credits were given in their respective ledgers, and the same conduct in all-respects observed, as if the proprietors of the two concerns had been different and distinct persons. A joint commission issued against Barker and the two Fields. At the time of the bankruptcy, the house of Barker & Co. was indebted to the house of Simon & Abraham Field in a considerable sum. The lord chancellor directed that the house of Simon & Abraham Field should receive from the effects of Wm. Barker & Co. a rateable dividend in proportion with their other creditors. That the effects possessed by each house should be considered as their distinct property, and the pro-

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duce divided amongst the creditors of the respective houses, in the same manner as if the firms had consisted of different persons. 6 Ves. 747. This decision results from the just and obvious principle, that each estate should bear its own debts, and that the credits due to an estate make a part of it, whether they be owing from the same, to other, or the same persons.

Where partners are engaged individually in other concerns, if they are distinct, proof has been allowed in bankruptcy of debts, as between the different estates, but not if they are merely branches of the same concern. *Cooke*, B. L. 529. 11 Ves. 413. 1 *Rose*, 146.

A joint commission of bankruptcy issued against Metcalf & Jeyes, by the description of oilmen, insurance brokers, dealers and chapmen. Metcalf also carried on the trade of an oilman, &c., as a distinct concern, and became indebted in his distinct trade, to the firm of Metcalf & Jeyes, in the sum of £7144 9s. 1d. The lord chancellor decided that the partnership was entitled to a dividend for this debt, out of the separate estate, with the separate creditors; though he said it would have been otherwise, if the debt had accrued

for money received by the partner, on account of the partnership, to be laid out for the partnership, and not as carrying on a distinct trade. 11 *Ves.* 413. 6 *Ves.* 123, 743, 747.

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In bankruptcy, among partners concerned also in other trades, the paper of one firm being given to the creditors of another, dividends were allowed out of both estates. *Dig. Mod. Ch. C.* 71-203. 8 *Ves.* 546.

On the principle of distinct interests, subsisting between the separate partnerships of the same firm, it is held that a transfer from one set of partners to the other, when fairly done, and on account of the several concern, is attended with the same consequences as if made to a third person. *Lex. Mer. Am.* 644. 1 *Bos.* and *Pul.* 539.

Where one partner carries on a distinct trade, and purchases goods of the firm, the other partner may, under his commission, prove a debt for goods sold to him by the firm. *Cooke*, 508.

The distinction which appears to run, though the latter English cases is, that one trade may prove against another, though represented by the same persons; but that one partner cannot prove against another, any claim he may

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have upon partnership account, until the partnership debts are first paid.

Thus the solvent partner cannot prove against the estate of the bankrupt partner, the amount due to him on the partnership account, until he satisfy the partnership debts, or indemnify the bankrupt estate against them. *Cooke, 537.*

So if he bring money into the partnership beyond his share, and is a creditor on the partnership fund for so much, he cannot prove it in competition with the joint creditors.—*Cooke, 532.*

But the debts claimed by the appellant, as assignee of William Ward and of James Johnson, from John Brandt & Co., did not accrue to them, as for balances due to them on partnership account, or for advances or disbursements on partnership account, or monies brought into the partnership, beyond their shares. These debts arose, in distinct trades, carried on by James Johnson and Wm. Ward, respectively on their separate accounts. J. Brandt & Co. were factors, Wm. Ward and James Johnson were merchants or traders, and in that character consigned merchandize or produce to them to sell for the consignors,

on their separate accounts, and to remit to them the proceeds. Not to apply those proceeds to partnership purposes, and to carry the same to partnership account; but as agents to receive for, and pay over to William Ward and James Johnson, in their distinct trades, and upon their separate accounts.— Such was the expectation of William Ward and James Johnson, when they made their consignments, and such the obligation of J. Brandt & Co., when they received them. If it were otherwise, a partner carrying on a distinct trade, could not, and would never have any dealings with the aggregate firm.

The debts claimed by the appellant, as assignee of E. P. Johnson & Co., and in his own right, and as assignee of Wards & Johnson, arose also upon consignments made by the parties to J. Brandt & Co.—4th article of facts agreed. Wm. Ward was a partner in the firm of Edward P. Johnson & Co., and William Ward and James Johnson, in the firm of Wards & Johnson. The appellees admit, that the appellant is entitled to a dividend upon the estate of J. Brandt & Co. for one half of the former, and one third of the latter claim. As to the residue they make the ob-

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jection before discussed, to the claims in the separate names of William Ward and James Johnson. That objection applies with still less reason to these claims. Edward P. Johnson, a member of the firm of Edward P. Johnson & Co., and David L. Ward, of the firm of Wards & Johnson, and were seized, *per my et per tout*, of the property consigned by their respective firms to J. Brandt & Co. *Wats.* 316. They certainly never contemplated that the property so consigned, or any part of it should be taken from their firms, and appropriated by, and to, and for the use of J. Brandt & Co., and be carried to the account of Wm. Ward and James Johnson with that firm. If Wm. Ward and James Johnson themselves, had been willing, they would have had no just right to make such misappropriation of the funds of Edward P. Johnson and Co., and Wards & Johnson. No partner has the moral right, without the consent of his co-partners, to apply to his own use, or turn from their proper course, the effects of the partnership. Moreover, William Ward and James Johnson, though partners, may have, in fact, no interest in the consignments made to Brandt & Co. by Edward P. Johnson & Co. and Wards & Johnson. "Each partner is to be allowed against

the other, every thing he has advanced or brought in as a partnership transaction, and to charge the other in account with what he has not brought in, or taken out more than he ought: and nothing is to be considered as his share, but his proportion of the residue on balance of the account." So an execution against one partner for his separate debt, does not put the other in a worse condition: for he must have all the allowances made him before the judgment creditor can have the share of the other applied to him. *Wat.* 316, 317. 5 *Cranch*, 289. Until a settlement of the accounts of Edward P. Johnson & Co., and Ward & Johnson, it cannot be known what, or that Wm. Ward and James Johnson have any interest in the effects of those firms. That settlement, however, has been made of the firm of Wards & Johnson, and William Ward and James Johnson were found indebted and in arrear to David L. Ward, and in consideration thereof, the debt due to the firm, from J. Ward & Co. was adjudged and assigned to him—4th article of facts agreed. That debt, therefore, though nominally due to Wards & Johnson, was in fact wholly due to the appellant, a stranger to the firm of J. Brandt & Co.

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All the beforementioned debts were created by *consignments* made by the parties to John Brandt & Co. as their factors or agents.

The consignment to a factor does not vest in him the property, and his possession is only in the right of another, for the purpose of sale. What is thus received cannot be liable for his debts, and on his bankruptcy, the effects of his merchant, do not pass by his assignment. *Lex. Mer. Am.* 398. He can have no property in the goods, neither will they be affected by his bankruptcy. 1 *Liv.* 262.

The goods or produce consigned by James Johnson, Wm. Ward, Ed. P. Johnson & Co., and Wards & Johnson, to J. Brandt & Co. as their factors, did not vest in them the property. Their possession was only in the right of their consignors, for the purpose of sale. And the rights of the consignors could not be altered or affected by the bankruptcy of the consignees. If they have sold the goods and received the price, they have received that also, not as proprietors, but as agents for their principals, to whom it belongs, and not to them. *Lex. M. A.* 398. If one partner is an executor or trustee, and lends the trust fund to the trade, with the knowlege of the co-partner;

it is a debt which may be proved against the joint estate upon its bankruptcy. *Cooke*, 537.

The reason is, the partnership has received the money, as trust money, and agreed to account for it as such. So factors who have received the goods or money of a co-partner, upon trust and confidence, and agreed to account accordingly, shall be bound to do so, and the debt thereby created, should be proveable by the partner, against the joint estate upon its bankruptcy.

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It is moreover objected, that the claim of the appellant, under James Johnson and Wm. Ward, is not the claim of the separate creditors of insolvent partners; but of the assignee of solvent partners.

I cannot see the force of this objection. If, upon the bankruptcy of a partner, the debt due to him in his separate trade from the firm, may be assigned for the benefit of all his creditors; why may he not assign it before his bankruptcy, for the payment of a particular creditor, or for other purposes, upon a valuable consideration? The reason why upon his bankruptcy, his separate creditors are entitled to it, is, that it belongs not to the joint, but to his separate estate. And as it is his sepa-

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rate property, and he is sole proprietor of it, he may consequently, before his bankruptcy, dispose of it in any manner he may think proper. If one partner carries on a distinct trade, and purchases goods of the firm, the other partner may, under his commission, prove a debt for goods sold to him by the firm. *Cooke*, 537. What does he prove? A debt due to the firm, a portion of which too, belongs to the partner against whom the proof is made, and from whose estate it is to be recovered. The equity of this claim is therefore something less than that of a partner carrying on a distinct trade, or of his assignee, against the firm. They are both, however, governed by the same principle; namely, that the debts due between distinct trades, are, in all respects, to be considered as due between strangers.

I contend also, that the debts claimed by the appellant before mentioned, being for the proceeds of consignments made by principals to their factors, are to be paid, not only out of the effects of J. Brandt & Co., in concurrence with other creditors of the same kind, but are privileged upon the separate estate of John Brandt and Henry Foster, the acting

partners, and to be paid prior to their other debts. *Vid.* 1 and 4 articles of facts agreed.

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I have shewn, that if A consign goods to B, as his factor, to sell and receive the price for and on account of A, he remains proprietor. B, for these purposes, is merely the agent of A, and is in no sense or degree the owner of either the goods or price. So if B become bankrupt, A may reclaim his goods in the hands of B's assignees or syndics. 1 *Liv.* 263. Or if the goods were previously sold by B; if upon credit the debt belongs to A, and not to the assignees of B. 1 *Liv.* 266. And if the money were received by B, it is the money of A, and if it remain in the possession of B, distinguishable from his other monies, A may claim it of his assignees. *Liv.* 265, 266, 286. 1 *T. R.* 369. 5 *T. R.* 227. So far the claim of A is, that of the proprietor upon goods, or money which he finds in the possession of another. But suppose the goods of A have been sold by B, the factor, and that he has taken a bond or note for the price payable to himself. Or suppose having received the price, he has not set it apart; but has put the money in the same bag or bank with his own, or has converted it to his own use. What then? B had only a nak-

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ed authority from A to receive the price of his goods, as his agent, and he had no right or title to that price. When received by him, he is only the possessor, whilst A is true proprietor. He can therefore do no act unauthorised by or without the consent of A, which shall legally prejudice him. So if B take a bond or note for the price, in his own name, A is entitled to receive the money, and not the assignees of B. 1 *Liv.* 275. Or if B have received the money, and laid it out in other goods, they are the property of A, and not of B's assignees. 1 *Liv.* 276, 278 to 287. But where B having received the price, has put the money into the same bag with his own, or has so misapplied it, that the misapplication cannot be traced to something in the possession of B, the rule of decision, according to the common, differs from the civil, law. The latter, however, is founded on that justice and good sense, to which all laws should conform; whilst the former in this, as in many other respects, too much cramped by technicality, does justice by halves, or as she may be assisted or required by some technical rule. So long as the money of A shall be kept by B, separate from his own money, and from it distinguishable as the identical money of A, the

common law is able to secure it to him. But from the moment that B shall confound it with his own money, or put both in the same bag or box, the common law, whilst she acknowledges the title of A, loses the power of giving it to him, though he shall be able to point to the very bag or box in which his money was put, and is now to be found. 1 *Liv.* 286. In the case of *Taylor and another, assignees of Walsh vs. Sir Thomas Plumer.* 3 *Maule & Selwyn*, 562.—Lord Ellenborough decided, that where “property, in its original state and form, is covered with a trust, in favor of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change;” “that an abuse of trust could confer no rights on the party abusing it, nor on those who claim in privity with him.” “That it made no difference in reason or law, into what other form different from the original, the change may have been made.” “That the product of, or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right

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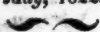
only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty in which case, is a difficulty of fact and not of law." So if B has expended the money of A, and therewith purchased real or personal estate; if the property so bought cannot be traced and identified, the common law has no means of affording relief to A. Nor can she do so, if B has paid debts with the money of A, instead of his own; although by giving a preference to A upon the estate of B, his creditors would be in no worse condition, than if the misapplication had not been made. If the money of A, received by B, for the price of his goods, remains in his possession, whether it be kept separate from, or in the same bag with the money of B, can make no difference in reason or justice. One dollar or one guinea is no better than another, and whether A shall take the very pieces received for him, or others in lieu of them, can be of no conceivable consequence. If property has been bought by B, the factor, with the money of A, whether it be confounded with his other possessions, or may

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may create a formal, but can make no substantial difference. If the property can be traced, the thing itself should be given; but if not, and B has it, and will not or cannot designate it, or has changed it; how obvious and how natural to determine that A should, in lieu of his particular property, have a privilege upon the estate of B for the price. By this B and his creditors sustain no injury; if you do not take from them the very thing that did not belong to them, you take no more. And accordingly the civil law provides "in cases of insolvency, that he who has delivered property to his debtor, by any contract which does not transfer the property in it, remains the master, and is paid in preference to the other creditors." "And that the same privilege exists for the price, if the debtor should have alienated the object thus placed in his hands." *Clay vs. his creditors.* 9 *Martin*, 523. Clay's case was that of a pledge of negotiable paper, and where the pledgee had a special property or title in the thing pledged or delivered to him. This is the case of factors or agents, without property or title of any kind to the things received

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by them, and is so much the stronger. A privilege is given upon the estate of a depository by the civil law, who receives no reward, to secure the return of the deposit. A factor receives a reward, and is therefore bound by a higher obligation than the depository. 2 Part. 638. Law 2. In the case of *Gilespie vs. the syndics of Peter Laidlaw & Co.*, in the court of the first judicial district, it appeared that Peter Laidlaw, attorney in fact for Gilespie, received for him a sum of money. "The court decided that when Laidlaw & Co. failed, they could cede to their creditors nothing more than their own estate: that the money paid to Laidlaw, as agent of the plaintiff, being the property of the plaintiff, could not be ceded to the creditors of Laidlaw & Co., that it was a sum certain, and it mattered not whether it was kept separate and distinct from, or commingled with the monies of Laidlaw & Co. That the agent possesses for his principal and not for himself: that the plaintiff could not be viewed in the light of a creditor of the estate of Laidlaw & Co. He claims that the syndics should hand over to him the identical sum which his agent received, and which he passed into the hands of the syndics, and never

made part of the insolvent's estate. The creditors cannot complain that there would be injustice in allowing this sum to be paid over to the plaintiff, because the estate of Laidlaw & Co. would be so much the richer than it ought to be, this never having formed a part of their estate." Judgment for the plaintiff vs. the syndics, for \$1606 3 cents, with interest. *Livermore* counsel for syndics. No appeal. The reason upon which the privilege given by the civil law, in all these cases, is one and the same. It is, that where one man receives the money or property of another, upon confidence that he will restore or pay it over to him without appropriating or using it as his own; if the law were not to accord this privilege, she would be accessory to, and would sanction a wilful breach of good faith in the debtor, or oblige him to commit it, when, perhaps, he did not intend it. Most men, when they apply to their own use the property or money of others in their hands, do so with the intention and hope of replacing it. If this should be postponed by circumstances until a bankruptcy, the law, as a careful guardian, should step in and do for them what they ought and would have done of themselves, if

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they could. It is the first duty of a factor when he has received the money of his principal, to pay it over, or remit it to him. He is not to appropriate it to his own use. He is not even to keep it: he is no depository for that purpose. But if he should keep it, or convert it to his own use, without the consent of his principal, the interests of commerce imperiously require that a privilege upon his estate should be sustained for it. That such should be the law of Louisiana is particularly desirable. The commerce of its city of New-Orleans is immense. In time it must surpass that of any other city on the globe. Its merchants, destitute of the necessary capital, are at present, unable to carry on this commerce upon their own account. They are the factors or agents of others, who reside at a distance, and by the insalubrity of the climate, are, perhaps, fated ever to remain so. As principals abroad cannot watch the motions of their factors here; or be present to demand their money as soon as received by them: to know that it is secured to them by a privilege upon the estates of their factors, in case of their bankruptcy, will give full credit to the latter, and by exciting confidence in the for-

mer, encourage them to commit their business to residents of the place, instead of sending supercargoes with their property, or special agents to dispose of it. By this the interests of both parties will be promoted, and what is of no less consequence, good faith from the one to the other will be insured. Privilege, as a security against the violation of good faith, in those who obtain the possession of the property or money of others, is a favourite principle of the civil law, whilst it is almost, if not altogether, a stranger to the common law. Among other instances, the civil law gives a mortgage on the property of those who, without being tutors or curators, have taken on themselves the administration of the property of minors, *persons* interdicted or *absent*, from the day when they made the first act of that administration. *Civ. Code*, 456, art. 20. A factor who sells property and receives money for a correspondent abroad, is one who takes upon himself the administration of the property of an *absent* person, and whom, as he cannot be present to secure himself, the law secures by a mortgage upon the factor's estate. The expressions of this article of the *Code* are clear and free from all ambiguity. The terms

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are general and comprehensive, and include the case of a factor for a merchant abroad. And whatever may be its spirit, the letter is to be observed. For, when the law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. *Civ. Code*, 4. art. 13. The debts before mentioned arose upon consignments made by parties in Kentucky, to a house in New-Orleans, as their factors, who accepted and took upon themselves the administration, the sale and disposal of the property so consigned, the collection of the proceeds, and the remittance thereof to their absent principals. To secure to these principals a faithful administration of their property by their factors, the civil law grants them a mortgage upon the property of their agents from the day when they received the goods. In pursuance of the same spirit, the civil law provides, that "the territory, the different parishes, cities and other corporations, *companies of trade*, or navigation and all public establishments, have a legal mortgage on the property of their collectors, and other accountable persons, from the day when they entered into office, *en fonctions*. *Civil Code*, 456. art. 25.

Companies of trade have a mortgage upon the estates of their collectors, and other accountable persons. The factor to a mercantile company, or company of trade, is an accountable person. He is their agent; their collector is neither less or more. The money he may receive or collect for the mercantile company, to which he may be factor, is as little his as the money received by their collector is his, and he is guilty of the same bad faith in converting it to his own use. There is the same reason for granting a mortgage upon the estates of both, for the security of their principals. It is not easy to see why the law should give a mortgage upon the estate of the collector or factor of a mercantile company, and not of an individual. Nor is it so, if the reasoning before advanced, be correct.

The legal mortgage extends to *all* the debtor's estate, either present or to come, which may be lawfully mortgaged. *Civil Code*, 456. *art. 28.*

If, therefore, as contended, the debts due to the appellant from Brandt & Co. as factors, be privileged; if the law accords a mortgage for them, it extends to the separate estate of Brandt & Foster, the acting partners, as well

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So far the argument has proceeded upon the supposition that the partners in the firm of J. Brandt & Co. were bound *in solido*, a supposition, the correctness of which, I by no means admit. On the contrary, I insist they were not so bound, for reasons which will be better shewn by Mr. Livingston, counsel for the appellant.

If the appellant should not be entitled to be paid the whole of the debts before mentioned, out of the effects of J. Brandt & Co. in competition with the creditors of the partnership, because a portion of them accrued to persons who were members of the company, it will follow that he may go for such portion upon the separate estate of John Brandt and Henry Foster, the administering and debtor partners. *Vid.* 1 & 12 articles of facts agreed.

2dly. I claim that the appellant is a creditor of J. Brandt and Henry Foster, to be paid out of their separate estates.

The 12th article of agreed facts, shews that Brandt and Foster are, and were at the time of their respite, indebted to J. Brandt & Co.

in a sum exceeding \$140,000. That firm East'n District.
May, 1822. was composed of four persons. It does not appear they were interested in unequal proportions, and we are, therefore, to take it for granted, their interests were equal. J. Brandt and H. Foster took from the joint stock \$140,000; that is, from themselves \$70,000, and the like amount from William Ward and James Johnson. Or rather, as the \$140,000 are the balance against them, it follows they have taken out of the partnership stock all they put in, and \$140,000 more: that amount, therefore, it would seem, is wholly taken from the co-partners, Ward & Johnson.

When Brandt and Foster withdrew this amount out of the partnership stock, they did not thereby create a debt for so much between themselves and the creditors of the partnership. As to that, there was no privity between the two. The creditors of the partnership have nothing to do with the balances or sums which may be due from the respective partners to the partnership. *Cooke*, 532, 534. *Lex. Mer. Am.* 640. They look to the existing state of the partnership effects. If that be deficient, they go upon the private estates of the partners, whether they be creditors or debtors.

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Brandt & Foster, withdrawing \$140,000 from the effects of J. Brandt & Co., thereby created a debt between themselves and co-partners, Ward & Johnson. They took the property of their co-partners, and whether with or without their consent, equity will suppose a promise, or raise an obligation, to account with them for it.

“Where one partner takes out more money from the partnership than his share amounted to, the other has a right to come upon the separate estate of that partner *pro tanto*.” *Dig. Mod. Ch. C. tit. Bankrupt, 63-84. 1 Atk. 223.*

William Ward and James Johnson, or David L. Ward, their assignee, is then entitled to go, not upon the partnership effects, in competition with joint creditors, but upon the separate estates of John Brandt and Henry Foster, for the balance against them on the partnership account. For that balance they are to be preferred, upon the separate estate in concurrence, with the separate creditors. *Dig. Mod. Ch. C. 57, 122*, and the cases before cited upon this point.

In the third place—The mortgage made by an authentic act, and duly recorded, from Wil-

liam Ward and James Johnson, to David L. Ward, to secure to him the payment of \$56,000, with interest, according to their note of that date, purports to convey to him—

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All their estates in Louisiana.

All their rights, interests, titles, claims and demands in the estate owned, possessed, or claimed by J. Brandt & Co., and particularly certain lots of ground therein specified.

And their accounts or claims upon the firm. *Vid.* the mortgage and 11th art. of facts agreed.

The word estate includes, not only real, but personal and moveable property, rights and credits. "The word estate, in general, is applicable to any thing in which the riches or fortunes of individuals may consist." *Civ. Code*, 94, art. 1.

It is true, that moveables cannot be the subject of the conventional mortgage. "But they may be subject to a privilege when they are yet in the debtor's possession, or within a certain time limited by law, after they have been put out of his possession." *Civil Code*, 458, art. 37.

Whilst then the debtor retains the property in his moveables, he holds them subject to a privilege for his debts by mortgage. If he sell them, the privilege is destroyed.

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But he may pawn them. "One may pawn every moveable, which is a subject of commerce." *Civil Code*, 446, art. 4.

"This privilege shall take place against *third persons*, only in case the pawn is proved by an act made either in a public form or under private signature; provided, that in this last case, it should be duly registered, in the office of a notary public, at a time not suspicious; provided, also, that whatever be the form of the act, it mentions the amount of the debt, as well as the species and nature of the thing given in pledge, or has a statement annexed thereto of its number, weight and measure." *Art. 6.*

The pawn, in this case, is made by an act in public form. It mentions the amount of the debt. It does not mention the species of the things given in pledge. Nor need it. That is required to distinguish the things pledged, from the other moveables of the debtor. Here all are pawned, and therefore, to distinguish would be superfluous. Moreover, this want of description can be objected only in a contest with the rights of *third persons*. Here no such right is interposed. No one pretends claim to the estate of Wm. Ward and James

Johnson, in opposition to the appellant. The syndics of J. Brandt & Co. have no right or title to the estate of J. Brandt & Co. They have only the power of selling it. "The surrender does not give the property to the creditors." *Civil Code*, 294, art. 171. The bankrupt still retains the title to it, and, therefore, notwithstanding the surrender, may make a sale not void, but avoidable only by those whose rights are injured by it. 3 *Martin*, 94.

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The contest then is simply one between the pawnee and the pawnors; and the syndics can have no greater right than the bankrupt to whom they represent.

"The privilege, mentioned in the preceding article, is established with respect to incorporeal moveable things, as moveable credits, only by an authentic act, or by an act under private signature, recorded as aforesaid, and notified to the debtor of the credits given in pledge." *Civil Code*, 446, art. 7.

To give full effect to the pawn of a moveable credit, even as respects third persons, it is only necessary to have an authentic act. If the act be under private signature, it must be recorded and notified to the debtor.

Here the act relied on is authentic. More-

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over, the notice required, as in the case of a private act, has been given by the suit brought by the appellant upon his mortgage. And if it were otherwise and necessary, it would always be open to him to give notice until a *third person* should be able to interpose a right.

But was it competent to William Ward and James Johnson to mortgage or pledge their interest in the partnership effects of J. Brandt & Co., without first paying the partnership debts?

It is said in one case that an assignment by a partner of joint property, to secure his separate debt, must be subject to the joint debts. *Cooke, 529.* But that case is without principle to support it, and there are cases the other way.

It is true, that if a partner assign his interest, it will be subject to the claim of his co-partner against him on partnership account. And why? Because the partners are seized, *per my et tout*, and each is, therefore, to be allowed against the other any thing he has advanced or brought in as a partnership transaction, and to charge the other in account with what he has not brought in; or has taken out, more than he ought, and nothing is

to be considered his share, but his proportion of the residue upon balance of the accounts.

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Cooke, 528. The partner has a specific lien on the stock. *Cooke*, 528, 529. The assignees, therefore, under a commission of bankruptcy against one partner, will be tenants in common, of an undivided moiety, subject to all the rights of the other partner. *Cooke*, 529.

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But the partnership creditors are not seized of the partnership effects, and have no lien thereon. In *ex parte Ruffin*, 6 Ves. 119. *Wats.* 265, the lord chancellor, speaking of partnership creditors, says, they have "clearly no lien whatsoever upon the partnership effects." All the partners, therefore, may sell, or mortgage, or pledge the whole, or any portion of their effects; or any one partner may do the same with his share; free from the claims of the joint creditors, since those claims attach no lien thereon.

If one partner withdraw from a firm, and the partnership effects be made over to the other, who continues the trade, and against whom a commission of bankruptcy afterwards issues, all the effects of the old partnership found in specie amongst the property seized under the commission, vest absolutely in the assignees

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of the new firm; and tho' there be outstanding debts of the former firm unsatisfied, these effects so found in specie, will not be considered as the joint estate of the former firm, either for the benefit of joint creditors, or the partner who has withdrawn. *Wats.* 264, 265. Not for the benefit of the partner, because he assigned his interest to the others. *Wats.* 267. Nor for the benefit of the joint creditors, because they had no lien. *Wats.* 266.

In *ex parte Fell*, 10 *Ves.* 374. *Wats.* 268. The case was—in March, 1803, one of three partners retired upon a covenant of the other two, in due time to discharge the partnership debts. The new firm was bankrupt in October, 1803. The petition of the retiring partner to have the specific stock and credits of the old partnership applied to the creditors of that partnership in preference, was dismissed.

Porter Shepherd and Richard Smith were partners, as linen drapers; dissolved their partnership, 5th Sept. 1803; published their dissolution the 25th Nov. 1803, and that all debts due from the partnership were to be paid by Shepherd, and on the 24th Dec. 1803, in less than two months after the dissolution,

a commission of bankruptcy issued against Shepherd. The assignees under the commission, possessed joint property of the bankrupt, and Smith. The joint creditors petitioned that the joint effects might be first applied to the joint debts. But the petition was dismissed, the lord chancellor being of opinion that the partner had a right to assign his interest; that the joint creditors had no lien or equity to prevent him, and that what before was joint had become separate property. *Wats.* 270.

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Upon a question, whether assignees, under a joint commission, against two partners, taken out after the bankruptcy of both, could maintain an action of trover against a person in possession of goods under a sale or consignment, *bona fide*, for a valuable consideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himself, but after an act of bankruptcy committed by the other partner. The court held the action could not be maintained, because the act of the partner, who, at the time of the consignment, had not committed any act of bankruptcy, bound both; and also, because, supposing the consignment avoided as to a moiety, by the act of bank-

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ruptcy of the other party, then it is an action of trover, by one tenant in common against another, which cannot be. *Cooke*, 529. *Cow.* 448. In that case Buller, counsel for the assignees of the bankrupts, contended that by the act of bankruptcy of Ridgate, the partnership between him and Barnes was immediately dissolved, and that the solvent partner had no longer a power over the whole: but each had his moiety only, to give or grant. *Cow.* 447. And lord Mansfield decided, that the utmost the plaintiffs could contend for, was that the act of Barnes did not bind the undivided moiety of Ridgate.

In that case the counsel admits, and the court decides, that after an act of bankruptcy by one partner, though followed by a joint commission against both, the other partner may dispose of his moiety of the effects: that it is his, to sell or grant, and that the assignees of the partnership, for the partnership creditors, cannot recover of his vendee.

In our case Wm. Ward and James Johnson, when they made the conveyance to appellant, of their interest in the partnership effects of J. Brandt & Co. had committed no act of bankruptcy, nor have they yet done so. They

had then at least the right of granting their proper interest, or portions therein, and they have granted no more. It is strange that this right should ever have been questioned. It is every day's practice, for one or more of partners to sell out their portions or interests in goods, and other partnership effects, independent of the claims of the joint creditors. This is more emphatically so by the civil law, according to which, a partner, whenever, and of whatever he pleases, of the effects of the firm, may take even the entire, and convert them, or purchase therewith other effects in his separate name, and which, though bought with the partnership means, will be separate, and not joint property, and consequently subject primarily to his separate debts. *Civil Code, 396, art. 37.*

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The mortgage preferred by the appellant, is made by solvent persons, who have a right to mortgage, either upon a past or present consideration. It was, however, made upon a present consideration, and for such consideration, even insolvents upon the eve of bankruptcy, have the right to mortgage.

The parties to the mortgage, declare upon the face of it, that the debt of 56,000 dollars,

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which it was given to secure, accrued by notes of that date. The agreement of facts between appellant and appellees, admits the mortgage as it is. It therefore admits all it contains, and that the debt of 56,000 dollars, accrued at the date of the mortgage, as therein stated. If the appellees designed to contradict the mortgage, to contend that the debt existed prior to that date, they should have qualified their admission, so as to have authorized them to make or require proof behind the mortgage. So far from doing so, they have nowhere contested or alleged that the fact is not as is assumed: they have nowhere apprized the plaintiff that they objected the consideration pre-existed the mortgage. But the court are to decide according to the facts agreed upon as they appear to them. A debt is shewn and agreed upon by the parties as far back as the date of the mortgage, and no farther. The court cannot go back; it cannot travel beyond the agreement of the parties, and suppose what does not appear, what is not even insinuated by the agreed facts, that the debt existed prior to the mortgage.

It does not appear expressly, what was the interest of the respective partners in the firm

of J. Brandt & Co. But as it does not appear that any one person of the firm was entitled to a larger portion than another, it is to be taken that their interests were all equal. The firm consisted of four persons, and William Ward and James Johnson, had therefore title to a moiety of the effects of the firm, of whatever they consisted, whether in possession or action. And their title to which they have conveyed to the appellant. Admit that a moiety of the personal effects or credits of J. Brandt & Co. did not pass to David L. Ward, by the mortgage from William Ward and James Johnson, or that he obtained thereby no privilege upon them; still it will remain that he is entitled to the real estate of William Ward and James Johnson, in Louisiana, or their interest in, or title to the real estate possessed or claimed by J. Brandt & Co., or in their name.

There can be no doubt as to the real estate of Ward & Johnson, and in their name; but it may not be so clear as to the real estate possessed by them, in the name of J. Brandt & Co.

That partnership was formed for the purpose of doing commission business in New-

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Orleans, as factors; and a factor is an agent who buys and sells goods for others, for a certain compensation, as before shewn. The effects of the firm, may consist of the stock, if any, brought into the partnership, or the proceeds of their industry. But the real estate purchased or claimed in the name of the firm, is foreign to the nature of it, and does not therefore make a part of the effects properly belonging to their partnership or factorage, and if purchased with the funds of the partnership, is a division thereof *pro tanto*. 11 *Mass. Rep.* 474.

The interest of each partner, therefore, in the real estate possessed in the name of J. Brandt & Co. belongs to his separate estate; is liable for the separate debts, and may be mortgaged to secure the payment of them.

The credit given upon James Johnson's account, for Rochelle & Shiff's notes, should be disallowed. The account was between James Johnson and J. Brandt & Co. as factors. The notes of Rochelle & Shiff resulted from the sale of an estate, that did not belong to the factorage partnership, and one half of which belonged to the separate estate of Wm. Ward and James Johnson. Brandt & Foster kept

more than their portions of the proceeds of East'n District. sale; the parts of James Johnson and W. Ward, May, 1822.
 or a portion thereof, was given to James Johnson, who is liable to William Ward for his half thereof.

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Livermore, for the defendants. The plaintiff claims as assignee of William Ward and James Johnson, two of the firm of John Brandt & Co., and contends that he is entitled to a dividend upon the partnership funds of said firm. The defendants say, that Ward & Johnson are bound *in solido*, for all the debts of John Brandt & Co., and can take nothing from the joint fund, until all the creditors of the partnership are paid. Although creditors of the firm, they are debtors of the other creditors represented by the syndics, and therefore can have no satisfaction until the joint creditors are paid. *Ex parte* Hunter, 1 *Atk.* 227, *ex parte* Russell, *ex parte* Parker, and *ex parte* Perie. *Cooke*, *B. L.* 532; *Pothier, de société*, n. 132, 173. A solvent partner cannot prove against the estate of a bankrupt co-partner, the amount of the balance due to him, unless he will satisfy the partnership debts. *Cooke*, *B. L.* 537. The equity of this rule is appa-

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rent, and it would be absurd to say, that John-son & Ward can appear as creditors of this estate as it is circumstanced, unless the plaintiffs' counsel can succeed in maintaining the ground he has taken, that the partners in Kentucky are not bound *in solido*, for the debts of John Brandt & Co.

In commercial partnerships, *en nom collectif*, the partners are bound *in solido*, for the debts of the partnership. *Civil Code*, 397, art. 41.—But, says the gentleman, the business of factors, or commission merchants, is not commercial: the factor is merely the agent of the merchant, and the business of the merchant is alone commercial. This notion has at least the merit of being novel; and I believe it is the first time that any person has seriously asserted that the business of agents, engaged in mercantile transactions, was not commercial. All the authors, who have treated of commercial law, have considered factors as a class of persons, whose powers and obligations were embraced in the subject of their discussion. I will refer to *Straccha*, *Aucaldus*, *Juan de Hevia*, *Casaregis* and *Beaves*. The French *ordonnance du commerce* of 1673, has prescribed rules concerning the responsibility

of partner in commercial partnerships, and their rules have been adopted in the *French Code du Commerce*, and are the same as in our *Civil Code*. By the French law, a particular tribunal was appointed for deciding all commercial causes; and we find from the 12th title of that ordinance, *art. 5*, that factors were within their jurisdiction; and by the *5d article* of the same title, that this jurisdiction did not extend to disputes which were not commercial. See also the commentary of *Jousse*, in the introduction to this title. The compilers of the *French Codes* have also considered the business of factors as commercial, and have laid down the rules for their government in the *Code du Commerce*, and not in the *Code Civil*. See *Code du Commerce*, *liv 1, tit. 6, art. 91-102*. In the commentary of *Mr. Delaporte*, it is said, *il y a des négocians qui ne font que la commission, c'est-à-dire tout leur commerce se borne à recevoir des marchandises pour les vendre au compte d'un autre. Plusieurs personnes peuvent s'associer soit en nom collectif, soit en commandite, pour faire la commission. Dans ce cas, il faut suivre les règles établies pour les sociétés de commerce. Les commissionnaires sont de véritables négocians.* 19 *Pand.*

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Franc. 239. The books of the common law, which have been so often cited in this cause, will also show that the general lien, in favor of factors, was first established upon evidence of the custom of merchants, *Kruper vs. Wilcox, Ambler* 252; and that all their negotiations, rights and duties have been considered with reference to the law merchant.

If the court were to adopt the doctrine of the plaintiffs's counsel, upon what would these articles of the *Code*, concerning commercial partnerships, operate? There is scarcely a general merchant in New-Orleans. The business is almost exclusively a business of factorage; in selling as agents the produce of the country, and in buying for the foreign merchant. It is said, that the "debts of a company of factors can only arise upon money or goods delivered to them, to buy or sell." That this is not true, will appear from a mere view of the nature of their business. The factors, who buy, may buy on credit; and the note given for the articles purchased is in the usual course of trade, and the vendor is a creditor of the company as much as any other person. So with the company of factors whose business it is to sell. It is a part of

their business to make advances upon consignments before the goods are sold: and to effect this, they must have credit and endorsers. They have, therefore, a right to make use of the name of the firm, for the purpose of raising money, and debts contracted in this way are within the usual course of business. It is a great fallacy for the plaintiff to say, that he alone has shown the nature and origin of his debt, and that he must be presumed to be the only real creditor of the firm. The other creditors have not shown in what manner their debts arose; because it was not necessary until a tableau of distribution should be filed. They may then have an opportunity of establishing their claims, should they be disputed.

It is next contended, that the debt due to Johnson & Ward makes part of their separate estate, and that they must be entitled to recover this debt, in order to pay their separate creditors. To support this position, a great number of cases have been cited from the books of chancery in England. These cases are of no authority here. They arise under the English bankrupt laws, and refer us to the mode of dividing the estates, where all the

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partners are bankrupt, and several commissions have issued. As these commissions issue under the same authority, and as the court of chancery has jurisdiction over all the parties, to do complete justice between them, rules have been established for apportioning the property among the joint creditors, and the creditors upon the separate estates. But the counsel shows no case where a solvent partner, or a partner residing out of the jurisdiction of the court of chancery, has been allowed a dividend to the prejudice of the joint creditors. On the contrary, the cases before cited show that this cannot be done. And if the creditor cannot himself appear as a creditor of the joint estate, his assignee cannot. It is admitted on this record, that the several debts, upon which the plaintiff claims, were assigned to him on the 1st September, 1820, for a valuable consideration then paid. And this was done with full knowledge, on his part, that the firm of John Brandt & Co., in New-Orleans, had suspended payment. He can, therefore, have no greater rights than the persons who made the assignment. *Nemo plus juris in alium transferre potest quam ipse habet* D. 50, 17, 54. The attempt now made is to

do that indirectly, and by means of an assignment, which Johnson & Ward could not do directly. They could not diminish the joint fund by appearing as creditors in their own names, but they strive to do it in the name of their assignee. But this assignee is subject to the same equity, and can claim nothing to which they were not entitled. But it is not contended that the debt due to Ward & Johnson, though nominally due to them, was, in fact, due to the plaintiff, having been assigned to him upon settlement. No private agreement of the parties can, however, alter the nature of this case; and for all that appears, Johnson & Ward are solvent and able to pay the plaintiff, without having recourse to this estate. This statement is also inconsistent with another part of the plaintiff's agreement, that these debts were assigned for a consideration then paid. The *Civil Code* has also been cited to show that a partner may be a creditor of the partnership. There is no doubt of this amongst solvent partners. But where the partnership is insolvent, and the partners are bound *in solido*, this cannot be admitted.

All the doctrine of distinct trades turns up-

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on the English bankrupt laws, the effect of which I have considered.

The plaintiff, moreover, contends, that he has a privilege upon the estate of John Brandt and Henry Foster. The consignments spoken of were made to John Brandt & Co., and the firm is debtor, and not the separate estate of the partners in New-Orleans. This privilege is attempted to be maintained upon the principles of the case of *Clay vs. his creditors*, decided in this court. The observations of the court must be taken with reference to the matter before it. That was a case of pledge. There can be no doubt, that in case of a deposit or pledge, the depositor or pawnor has a privilege; because the articles have not been delivered for the purpose of sale, the property remains in the original owner, and the depository or pawnee has been guilty of breach of trust in disposing of them. But this case is different. The goods were consigned to Brandt & Co. for the purpose of being sold. So long as they remained in specie, they were the property of the consignors and might have been taken by them. So, if they had been changed for specific property, or for notes which remained with the factors, these would

have been the property of the consignors. But in selling the goods, the factors have merely executed their trust; the property is gone, and the proceeds having come into their hands, they are merely debtors for the amount. The law has given no privilege in such case, and although the judge of the first district has done it, I cannot believe that this court will follow the example. From the circumstance of no appeal having been taken from the decision of the cases of *Gillespie vs. the syndics of Laidlaw*, and the *syndics of Walmar vs. Phillips*, it must not be inferred that the doctrines of the district judge were acquiesced in by me. Other circumstances prevented the appeal, which need not be stated here. The plaintiff's counsel is mistaken in supposing that the commerce of New-Orleans would be favoured by establishing such a privilege as is here contended for. On the contrary, it would destroy the credit of all commission merchants.

The last question respects the mortgage. At one time the plaintiff contends that John Brandt and Henry Foster had the sole management of the concerns of the partnership, and at another, that the Kentucky partners

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may mortgage the partnership property here. This mortgage may have an effect upon any of the morgagor's separate property in Louisiana, but it does not concern the defendants. It can certainly have no effect upon the property of John Brandt and Henry Foster; and no authority has been shown for Johnson and Ward to hypothecate the property of John Brandt & Co. I have shown they could not sell their interest to the prejudice of the general creditors. An assignment by one partner of joint property, to secure his separate debt, must be subject to the joint debts. *Cooke, B. L. 529.* It is said that this mortgage was given for a present consideration. But this consideration does not appear to have been for the partnership, but for the said Johnson and Ward alone. And if Johnson & Ward were solvent, the firm was insolvent.

Livingston, in reply. From a recurrence to the facts, it will readily be perceived, that in order to decide upon the rights of the parties, the first inquiries will be—what was the nature of the partnership between J. Brandt and his associates, in the business carried on under the name of John Brandt & Co.? And

what were the obligations which resulted from it, as well as the partners towards each other, as of the whole towards those with whom they dealt?

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The only evidence we have of the nature of the partnership, is contained in the first fact stated in these words—"the late firm of John Brandt & Co. was formed for the purpose of doing commission business, as factors, in the city of New-Orleans, and was composed of John Brandt and Henry Foster, William Ward and James Johnson; the business of the said firm was transacted by John Brandt and Henry Foster, who resided in New-Orleans, whilst the said William Ward and James Johnson resided, as they did, during the whole period of said partnership, in Kentucky."

What species of partnership is to be inferred from these facts? Let us first consult our statute law on this point. It first (*Civil Code*, 388, 390) divides partnership into universal and particular—this clearly comes under the latter division. By the tenor of the 12th, 13th and 14th sections, taken in connection it would appear that a subdivision was made of particular partnerships, into such as were commercial, and such as were made for other pur-

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poses—the 12th, declaring that an association for a joint interest in a specified thing, and its profits was a particular partnership, and the 13th, extending the definition, so as to embrace a like agreement relative to a particular undertaking, the exercise of some trade (*metier*) or profession. These seem to exclude commercial partnerships, for the 14th article, and those which follow it, give us separate rules, as relating to them.

There are three kinds of commercial partnerships established, says the text: ordinary partnerships, (*la société en nom collectif*) corporate partnership, (*celle en commandite*) special partnerships, (*annonyme ou inconnue*.) Are there any others? It would seem not: for I believe it is a good rule of construction, that when a statute enumerates particularly the objects which it means to establish, that every thing not enumerated, is meant to be excluded. Let us then examine the definitions given by the same law, of each of these, and see whether we come within either.

1. The ordinary, (*société en nom collectif*) "this is entered into by two or more persons, respecting any commerce whatever, to carry on the said commerce, in the name of all the

partners; the one under consideration, as I shall presently more fully shew, was not respecting any commerce; but if it were, it does not come within this definition, for it was not to be "carried on in the name of all the partners." This partnership also relates plainly to one having stock to be used in trade, for by the 16th article it is to consist of what each of the partners has put in the common stock.

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2. The corporate partnership, (*société en commandite*) "is that in which one of the contracting parties carries on alone, and in his own name, the commerce for which the other contributes a certain sum, which belongs to the partnership under the condition of a certain share in the benefits or losses, without however his being liable to be answerable for losses beyond the amount brought by him into the partnership."

This article is not clearly expressed: does it mean that the corporate partnership is only such an one as is created by an agreement containing stipulations that the business shall be carried on in the name of one only, that a certain sum should be contributed, and that the unknown partner should be liable to that amount only? Or does it declare that such re-

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striction of liability is the consequence attached by law to an agreement for carrying on trade in the name of one, by a fixed contribution of capital to be furnished by each? I should be inclined to adopt the first of these suppositions: but whether the one or the other is sanctioned by the court, the contract before them cannot come within the definition; because, as I hope to shew, it does not relate to commerce. But I confess, that if the partnership between Brandt and his associates, be considered as a commercial partnership, and to come within either of those definitions, contained in the *Code*, this is the only one in which it can find a place.

2. The special partnership (*société anonyme ou inconnue*) is the only one which remains to be examined. "It is that by which two or more persons do agree to become partners in a certain speculation, (*dans une certaine négociation*) to be made by one of the partners in his own name simply." No argument is necessary to shew that this relates to a particular operation of commerce. The purchase of a cargo, the making a single trading voyage, &c., with which the partnership began, and ends, and that therefore, the one under consideration bears no resemblance to it.

I infer therefore, that this partnership comes within neither of the divisions established for commercial partnerships by our law.

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What then is its legal character? I answer, a particular partnership coming under the definition contained in the 13th article, for the exercise of a trade or profession. Not a commercial partnership. The object of this association was, by the statement of facts, "for the purpose of doing commission business as factors."

What is a factor? Is he a trader or a merchant? No, he is the agent of a merchant, he is no more a merchant than his book-keeper, or than the clerk of a lawyer is a counselor. *Lex Mercatoria Americana*, 388. "A factor is a commercial agent, transacting the mercantile affairs of other men, in consideration of a fixed salary, or a certain commission." The same definition is given in *Livermore on Agency*, 68.

The English bankrupt laws which embraced within their purview:—"any merchant, or other person using or exercising the trade of merchandise, by way of bargaining, exchange, rechange, bartery, *chevisance*, or otherwise, in gross, or by retail, or seeking his or her trade,

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or living by buying and selling," from the 13th of Elizabeth, to the 5th of George II, these expressions were not construed to include factors, or brokers, until they were included by name, in the last mentioned statute. *Cooke's bankrupt laws*, 48. *Ib.* statutes prefixed to 7th edition, 161, for the statute of Elizabeth. *Ib.* 64, for statute of George II.

Brokers and factors, then were not considered as merchants, or persons exercising "trade or merchandise, seeking their living by buying and selling." Then they were not engaged in commerce; for the trade of merchants, the business of buying and selling is commerce; then partnerships formed for factorship, are not commercial partnerships, but the one under consideration was made "for the purpose of doing commission business as factors." Therefore the one under consideration is not a commercial partnership.

If I have succeeded in shewing that this is not a commercial but a particular partnership, the next inquiry is, what are the obligations arising from it, as between the partners to each other, and as respects them collectively, and individually, as respects those with whom they deal? Our law surely is explicit,

and leaves no room for doubt or cavil: some of the obligations of the partners to each other will be hereafter applied, at present my object is to shew that in this particular partnership, the partners are not bound *in solido*: this is clearly expressed in the whole of the 2d section, *Civil Code*, 396-8; particularly by the 43d and 44th articles; and in the 45th, it is even provided, that even when the debt is contracted by one of such partners, in the name of the whole, and for their use, unless it be proved that he had special power so to do.

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Having ascertained the nature of the partnership and its effects, we may consider the facts on which the controversy arises.

John Brandt and Henry Foster reside in New-Orleans, and carry on the whole of the business. James Johnson and William Ward make consignments to them of produce, their separate property, to be sold as their factors. The house of Wards & Johnson, consisting of David L. Ward, the plaintiff, James Johnson and William Ward, also make consignments of the same nature, and for the same purpose. The house of E. P. Johnson & Co. consisting of E. P. Johnson and William Ward, also make

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consignments to the said John Brandt & Co. at New-Orleans, to be sold as their factors. That Brandt & Foster are indebted to the partnership in a large sum. Finally, Lee White also made such consignments, and for the same purposes.

All these consignments were received by John Brandt and Henry Foster, the two acting partners, who resided at New-Orleans.— And goods were sold, but the money never remitted, and all these demands are regularly vested by assignment in the plaintiff.

Brandt & Foster, in the name of the company of John Brandt & Co., and in their individual capacities, applied for a respite, under the laws of this state, which they obtained, and not complying with the terms of the respite, they were afterwards compelled to a forced surrender of their property. The partnership of John Brandt & Co. was dissolved, and public notice thereof given at the time the respite was applied for.

These are all the facts necessary for the determination of the first question, which is, whether the plaintiff in this cause is entitled to come in with the other creditors of the partnership, for all the sums assigned to him, as

sforesaid. The defendants contend, that for all those which were originally due to the partners of the house, he must be postponed until the other creditors are paid. To support this, he quotes *Cooke's Bankrupt Law*, 500, 503, *Hunter's case*. This case proves directly the reverse; for Hunter there having borrowed, or rather taken money belonging to his brother, and lent it to the partnership of which he was a member, the amount was considered as part of his separate estate, and was divided among his separate creditors, he, individually having also become bankrupt: it is true, *Cooke* says a contrary determination had taken place; he quotes in the margin several cases to prove this, but confesses he has not been able to obtain a note of any of the cases, except one.

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The general principle of the English law is, that the joint fund pays the joint; the separate fund the separate debt: this is decided in so many cases, that it is unnecessary to refer to them, and consistently with the plain dictates of justice, there could be no other. And yet the cases last quoted from *Cooke* seem to contradict this principle. If each estate pay its own debts, and if what is equally undeniable, one partner may, on account of a separate

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trade, be a creditor of the joint estate, it seems to follow, that a solvent partner, or his assignees, if he be insolvent, may prove his debts against the joint fund. And then the cases quoted by *Cooke* are inconsistent with the general doctrine thus universally established. Yet, according to the principles of the English law, they may be reconciled. Where all partners are indiscriminately liable for the whole of the partnership debts, it is evident that no one partner can have any interest in the joint fund until all the debts of that fund are paid; therefore, the partner, tho' a creditor, being by the English law also a debtor, in consequence of his liability as a partner, the law operates a kind of compensation between the two debts, and will not allow him to receive the one until he pays the other. There may be some propriety in establishing this rule under the English law, if it be established. There is, however, some reason to doubt on this subject, even in England, as will appear from a consideration of the following cases. *Dig. Mod. Ch. C.* 71, 203. 8 *Ves.* 50e. *Lex Mer. Am.* 641-2, from which it would seem to be established, that although a creditor partner, or his assignees, could not

prove against the joint fund, when his credit arose only from superior advances as partner; yet, that the law was decidedly different where the credit arose from a separate transaction, trading in his individual capacity with the house of which he was a member. But our debts arose in this way; therefore, in England we should, as the representative of the separate partner, be allowed to prove against the joint fund. This point being more fully discussed in the argument of Mr. Grayson, I refer the court to that. But in this country, and the case before the court, it seems to me useless to enquire whether such be the law in England or not, because here, I flatter myself, I have shown that the species of partnership which was entered into between the partners, did not involve any responsibility on the part of any of the parties for acts of the others; in other words, that they were not bound *in solido*.

What renders this more striking, is the nature of the partnership.

It is for, "carrying commission business as factors." It is a principle that no undertaking of a partner can bind the partnership, unless it be one contracted in the course of that bu-

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siness, for which the partnership was formed.

2 *Cur. Ph. illustrada*, 55. (62) In a partnership formed between workmen for building houses, though the whole would be liable on a contract made by one for brick or lumber, surely they would not, if one of them chose to buy silk, laces, or perfumery. On this view of the law, who can be the creditors of a company of factors? Only those whose debts arise in the course of factorage business—those who have entrusted them with goods to sell, and to whom they have not accounted for the proceeds; those who have placed money in their hands to purchase, and for whom the purchase has not been made; these are, in the nature of things, the only creditors which a company of factors can have. Those who sell goods, or lands, or slaves to the factors, are not creditors of the company as such, though they may be creditors of all who compose the company, if all of them make the purchase, or authorise one of their number to make it. In the present instance, it is admitted, that all the partners, except Brandt and Foster, resided in Kentucky, and had no agency in contracting the debts. On this head then I come to this conclusion: That the

debts represented by the plaintiff, being admitted to have arisen from merchandize or produce sent to the company for sale, those debts are properly chargeable against the company's effects, and that the decree ought to direct that no other creditors of John Brandt & Co. be admitted in concurrence with them, but such as have debts arising in the same manner.

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If the court admit this principle, there will then be no necessity for considering the next point I made, viz, that the creditors of a factor, or even of a merchant, who may also act as a factor, are entitled to a preference over other creditors, if the debts arise either from money deposited with the factor to purchase, or from the proceeds of goods sold on commission; it will be useless to consider this if none but creditors of this description be admitted to prove against the joint estate; because, being then the only creditors, they would, in that case, come in *pro rata*, and they would do the same if they were admitted as creditors, privileged in equal degree. As it is, however, uncertain whether the view I have taken be the one which will concur with that to be taken by the court, I would refer them

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to the law cited in the case of *Durnford vs. Se-ghers' syndics*, and to their decision, as well as the law referred to, in the case of *Trimble vs. Clay's syndics*, where it appears that money or effects, which may be changed into money, placed in the hands of another, subject to the order of the proprietor, and even with permission to use them if no interest be paid, forms a special deposit, and gives the owner a privilege, immediately after the creditors, by hypothecation, but before those, by simple contract.

There seems to me great reason that this privilege should attach in cases of factorage : it is in itself a transaction of the most fiduciary nature, quite as much so as that of a regular deposit. No other credit is given to the factor than that of confidence in his integrity, not as in other cases, on his capacity to pay ; the property either of the thing confided to him to sell, or of the proceeds, is never vested in him, and he is as much guilty of a crime in morality if he appropriate the one or the other to his own use, as he would be if he took it without the consent of the owner, out of his possession. This transaction, therefore, comes precisely within the definition given by the

Spanish law, and recognised by this court in East'n District
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I come now to consider, whether if the plaintiff be either excluded from coming in a creditor of John Brandt & Co., or if the funds of that estate be insufficient to pay him, he cannot come upon the separate estates of J. Brandt and Henry Foster, who are debtors to the firm of J. Brandt & Co., and who are also insolvent, and represented by the same syndics. If the court should be of opinion contrary to the argument sustained on this head, that all the members of this partnership are bound *in solido*, then there can be no doubt that the plaintiff must come in upon the separate estate of Brandt & Foster, after their joint fund is exhausted. But even if they should think, as I trust they will, that they are not liable *in solido*, still I think, from the circumstances of this case, the creditors of the joint fund of John Brandt & Co. must come on the estates of John Brandt and Henry Foster.

1. It is stated in the fact, No. 12, that a part of this separate estate was paid for by the partnership fund.

2. John Brandt and Henry Foster were the

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only acting members of the firm, and it would hardly be permitted, that they should, by their own act, make themselves, in their private capacity, solvent, by appropriating the goods or money entrusted to the firm, while the firm was, by this very operation, rendered insolvent. Their case is different from that of the other partners: these last were not bound to the joint creditors farther than their interest in the stock, because they never made any special agreement to that effect with any of the creditors; and because, in this species of partnership, the law does not imply it. But with respect to John Brandt and Henry Foster, the case is different, because they did make a special agreement with the creditors; they acted, they contracted the debt, and they shall never be permitted to get rid of their personal responsibility; every one, therefore, who contracted with them, though in the name of the firm, has a right to come on them individually, if the funds of the partnership fail. I conclude then that the plaintiff, if he be not paid the full smount of his debt, out of the estate of J. Brandt & Co., has a right to a dividend from the particular estate of John Brandt and Henry Foster.

Another question arises out of the mortgage mentioned in the statement of facts. By the 5th act, it appears that purchases were made of real estate in the city of New-Orleans, and by the 11th fact, that on the 1st September, 1820, William Ward and James Johnson executed to the plaintiff, a mortgage on the property, for securing a debt of 56,000 dollars. There can be, I believe, no good reason to doubt of the validity of this mortgage, and that it will attach on the one half, which is the interest of the mortgagors in the property.

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The first inquiry is, what interest William Ward and James Johnson had in the property? If it was partnership stock, they, as partners, had a right to dispose of it, and their mortgage would burthen the whole of the property. But I do not think it can be so considered.

Land purchased by a person in the joint names of himself and another, although he be not authorized to make the purchase, (or what is the same thing, by a partner of a house established for other purposes, in the name of the firm) is taken on the joint account, and is the property of all the partners; each has his individual share, and it is held subject

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to all the rules which are established for real property: it is to be transferred, incumbered and bequeathed in the same manner as if it had been jointly acquired by the parties in any other manner; each owner may sell or incumber his share, independent of his associates. This doctrine is acknowledged in its fullest extent, by the decision in *Smith vs. Kemper*, 3 *Martin*, 626.

The court there say, "By the articles of co-partnership, the appellee had no right to buy real property for the firm, yet he did so; what is to be the consequence? It is not disputed, that when a man undertakes to buy a thing for another, without authority, the person for whom the purchase is made may avail himself of it." The same point is decided, 11 *Mass. Rep.* 474. Now here John Brandt and Henry Foster make a purchase of real property in the name of J. Brandt & Co., that is to say, for John Brandt, Henry Foster, William Ward and James Johnson, William Ward and James Johnson agree, in the language of this court above quoted, to "avail themselves of it." The act then is complete, they are the owners of one half of the real property; and, of course, have the right to dis-

pose of that interest; they exercise this right by mortgaging it for a just debt. By what train of reasoning can this transaction be avoided? Will it be said that the partners of the house at New-Orleans, having applied for a respite, as in the name of the firm, prior to the date of the mortgage, it is, therefore, void? If it should, I answer:

1. That William Ward and James Johnson did never apply for a respite, that they are still solvent, and ready to meet every legal engagement they have contracted; and that, therefore, they had a complete right to dispose, in what manner they pleased, of their joint interest in the real estate, which I have shown, was not held as stock, but as property in common with the other persons composing the firm.

2. I answer, that John Brandt and Henry Foster could, from the nature of the business they carried on, contract no debt, but by appropriating monies or effects entrusted to them for the purpose of purchase or sale; that if they did contract other debts in the name of the firm, neither the joint stock of the firm, nor the other partners, individually, would be liable for them; and that, therefore, they could

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not make the firm insolvent for the purpose of delaying the payment of such debts; and as it does not appear that any other debt besides those in the hands of the plaintiff, arose on such deposits of produce or money, there is no evidence that the firm is insolvent, although it may be unable to pay the debts illegally contracted in its name by John Brandt and Henry Foster.

3. I answer, that the mortgage was given more than three months before the petition for a forced surrender: and that, therefore, although my other reasons should be deemed insufficient, the mortgage must attach.

4. The mortgage was given for a consideration accruing at the time it was executed.

Another point necessary to be noticed in this case, is the place of residence of the parties. If they reside at different places, carrying no business in their separate names, they are not considered as partners, says our law, but mutually as principals and factors. 5 *Partida*, tit. 10, l. 4, in notis (3) *Si sint plures socii diversis locis exercentes, videntur invicem institutores et invicem praepositi*. 2 *Cur. Ph. illustrada*, 46. (29) "When two partners are in different places, the one cannot bind the other,

unless for the part which belongs to him in the company's stock, unless there be an agreement between them to that effect, or when one is specially appointed by the other. Thus, although the partnership were of a nature that would make the partners liable *in solido*. this circumstance would take away that liability."

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We conclude then, that the plaintiff, in this cause, is entitled to a preference over the creditors by simple contract, and must come in *pro rata* with debts, if there be any, which arise from consignments.

That he is entitled first to exhaust this privilege on the joint estate, and to come in for the balance on the separate estates of John Brandt and Henry Foster.

That he is entitled to the proceeds of all the real estate contained in the mortgage, and of the personal estate mentioned therein as a pledge. And that he must come in for a dividend with the other creditors of the estate for all the balance due to Johnson and Ward, as creditor partners, independent of their credits arising from consignments.

PORTER, J., delivered the opinion of the court. This action ought, in strictness, to

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have been cumulated with the other proceedings in the bankruptcy of Brandt & Co., and J. Brandt and H. Foster; however, as it has been carried on to this stage, without the objection been taken, we have considered the different questions raised in it.

The first is, what species of partnership was entered into between William Ward and James Johnson, of Kentucky; and Henry Foster and John Brandt, of New-Orleans? Many of the other points urged in argument depend on the decision of this.

The articles of partnership state, that the aforesaid persons had associated, "for the purpose of doing commission business as factors, in the city of New-Orleans."

The plaintiff's counsel contend, that this is a particular partnership, coming under the definition contained in the 13th article of the *Civil Code*, 390, which declares, that where persons associate together for the exercise of some trade or profession, it is a particular partnership; in the French text, the words are, *quelque métier ou profession*.

The court must understand the expression, "to do commission business in new-Orleans, as factors," as it is to be presumed

the persons who entered into the contract did, when they used it. To enable us to do this, the first rule of construction is to endeavour to ascertain what was the common intention of the parties, rather than adhere to the literal sense of the terms. *Civil Code*, 270, art. 56.

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Factors are those who are appointed to transact a particular business, in the name of another, and not in their own. *Curia Philippica, Commercio terrestre, lib. 1, cap. 4, n. 1.*

Commission business is transacted in this city, not in the name of the principal, but in the name of the house to whom the property is transmitted for sale. They dispose of it as their own; take bills payable to themselves for the price; and when they purchase, it is they who state themselves buyers, not the house in Philadelphia, London or Paris, who may have commissioned them.

The different members of the sentence taken together, convince us that the intention of the parties was to establish a commission house in this city, of the ordinary kind. The expression, "as factors," does not prove any thing else was contemplated; for the meaning attached to the word factor, in com-

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mon parlance, is quite consistent with the other terms of the sentence, as we understand them.

Our law defines merchants ; those persons who buy and sell merchandize to make profit by it. *Curia Philipica, lib. 1, cap. 1, n. 3.* Commission merchants, who have a house established in New-Orleans, and who live by buying and selling those objects, which form the commerce of this place, come almost within the letter of the definition just given.

The circumstance of the business not being carried on in the name of all the partners, is presented as an objection against considering it an "ordinary partnership." *Civil Code, 390, art. 15.*

We understand the expressions in our *Code*, to mean the name which is given to the firm by the consent and approbation of the partners ; the commerce is then carried on in the name of all ; and that it is not of the essence of a commercial partnership, that the name of each of the partners should be inserted in the style of the house. In the French text, the words used for ordinary partnership, are *la société en nom collectif*. The article next succeeding that quoted in support of this novel idea, says, the stock consists of what is

acquired in the partnership name, *au nom social*; and in page 396, art. 37, n. 5, we learn that contracts signed, "such a one & co." gives the property to the partnership, although the purchase may have been made out of the monies of one of the partners.

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As the plaintiff claims, as assignee of several persons, we shall first examine the right acquired from two of the partners of the house of Brandt & Co.

In the latter character he avers:—

1. That he has a right to prove the debt due to the separate partners by the firm, and to be paid *pro rata* with the other creditors.

2. That he is the only person who has proved that his claim arose from consignments on commission business, and therefore the only one who should be paid.

3. That as assignee of the partnership in Kentucky, of E. P. Johnson & Co., and Wards & Johnson, he has a right to prove the debts contracted with them, although some of the partners of these houses were members of that of Brandt & Co.

4. That consigning goods to a factor, does not vest in him the property of these goods, and that the consignor has a right to be

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paid in preference, even if the object has been alienated.

5. That the debt due to him is privileged on the estate of J. Brandt and H. Foster; because they were agents to collect monies for persons not living in Louisiana, and the law has given a mortgage on the estate of those who administer the property of the absent.

6. That he is a creditor of J. Brandt and Henry Foster; because, when partners appropriate partnership funds to their own use, they become debtors to the other partners, not to the creditors of the partnership. And lastly, that the partners in the house of Brandt & Co., who resided in Kentucky, executed a mortgage in his favor, hypothecating for the security of the debt due him, all the real estate owned by them in Louisiana.

I. If the plaintiff was correct in this position, it would lead to very inconvenient results, and produce a circuitry of actions, which the law abhors. The partners in whose name this claim is sought to be enforced, are bound *in solido*, to the other creditors of Brandt & Co. for the debts of that partnership, and liable at any moment to be sued for them. We can-

not therefore perceive the justice or legality of permitting debtors to withdraw funds from their creditors or creditors agents, (for such the syndics are) unless they offer at the same time to discharge their debts. At the dissolution of a partnership, all debts due, must be paid before there is a division among the partners. *Curia Philipica*, lib. 3, cap. 3, sec. 46. 10 *Martin*, 435. The common law cases, quoted in argument, are quite opposed to the doctrine for which the appellant contends.

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II. The claim to be paid on the ground that the present plaintiff is the only creditor who has proved that his debt arose from consignments, takes its rise from the idea which has here been already examined in the first part of the opinion:—viz. that this was a co-partnership of factors, in the limited sense in which that word may be understood. We have already seen that it must be considered as an ordinary commercial partnership, for the purpose of transacting commission business. The law, as cited from the *Curia Philipica illustrada*, lib. 3, cap. 3, n. 62, seems to have been modified by the provision contained in the *Civil Code*, art. 41, n. 4, which declares

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that the partnership is bound by the debt, contracted in its name, even when that debt has not turned to its advantage; unless by the nature of the contract, it should appear that it had nothing to do with the affairs of the partnership. The question then is, have no other debts but those which arise from consignments relation to the affairs of the partnership? We are not prepared to say so. When it forms a part of the business of a house, such as this was, to buy and sell; when those sales are made in its own name; when the credits which it receives in payment, are taken payable to itself, and must frequently be negotiated for the purposes of immediate remittance, or to meet the acceptance, come under for the consignors; when, in making purchases, it becomes necessary that it should be responsible in the first instance to the sellers: when all this, and much more, in the same way, must be done, to enable the house to carry on the business for which it was formed; it is to be presumed the partners knew that these means were necessary to the end they had in view: that they contemplated the exercise of them, and therefore, cannot now exclude all creditors, save those who forwarded goods to be sold on commission.

III. It is contended, that as assignee of the partnerships in Kentucky, of E. P. Johnson & Co., and Wards & Johnson, the appellant has a right to prove, and be paid the debt contracted with those houses, although some of their members were also partners in the house of J. Brandt & Co.; and in this position we concur. It has been already decided that the private debt of one partner cannot be set off against that due the partnership. 1 *Martin*, 25, 4 *ibid.* 378. Yet this is what is attempted to be done here. The firm of Brandt & Co. owes E. P. Johnson & Co., and they resist payment, because some of the partners of the latter owe the former, or rather are responsible for their debts.

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IV. The appellant next insists, that he has a privilege on the estate of the insolvents, in preference to mere chirographary creditors, because placing merchandize in the hands of a factor, does not transfer to him the property in it, and that the same privilege which exists on the thing, attaches itself to the proceeds, if the object be sold. The court thinks otherwise. The delivery of property to a factor, to be disposed of, confers a right to sell it,

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of course a sale by him divests the proprietor of his title. The case of *Clay vs. his creditors, 9 Martin*, is not at all like that now before us. Pledging an object, neither alienates it, nor confers a power on the pawnee to do so, unless in default of payment. If sold otherwise, the law justly gives a privilege, for the owner is deprived of his property without his consent. In the case of *Clay* already cited, the court declared that when the property was in the hands of an insolvent, by virtue of a contract which did not transfer the owner's title to it, that there existed a privilege on the object, or if alienated, for its value. If the contract did transfer the title, that privilege was lost; and so we consider it, if the owner authorises an other to make the transfer, for then, in case the proceeds cannot be traced, the agent becomes personally indebted.

V. The absent persons spoken of in our *Code*, in whose favour the law gives a mortgage on the property of those who administer their estate, are perhaps those who are *declared absent*, not those who are reputed such. But if they were the latter, the plaintiff's pretensions are not much advanced by such a construction.

It is insisted we must take the letter of the law, *Code*, 456, art. 20, and not look at its spirit. Be it so:—the expressions in English are, they who not being tutors or curators, take on themselves the administration; in French, *ceux qui se sont immiscés*. These texts must be construed together, for the law was passed before the adoption of our constitution, and in both languages. 2 *Martin's Digest*, 98. So construed, there is not a doubt that the words used convey the idea, that the persons alluded to, are those, who without the consent of the proprietor, undertake to manage his estate: who intermeddle with it.

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VI. By the statement of facts, it appears that J. Brandt and H. Foster, owed to J. Brandt & Co. a large sum of money. That debt, like every other due the partnership, passed to the creditors of the firm, in consequence of a forced surrender being ordered, and they, on their agents, have alone the right to receive it. The decisions cited on this point, were given in cases where both the partnership and separate partners had become bankrupts; they relate to the distribution of the estate, between the different creditors of each,

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and they have no application to an action like the present, where the partner who advances these pretensions, is solvent, and responsible for the partnership debts.

The last point presents no difficulty. The mortgage was executed in Kentucky, months after a respite had been accorded to the partnership here. A preference of this kind, could not be given by all the firm after that respite was applied for; it follows that it could not be accorded by a part of that firm,—otherwise each of the members, by acting individually, might alienate all the property of the partnership, although they could not do it collectively, which would be absurd. There is nothing in the argument that the partners in Kentucky were solvent: for though they might be so individually, yet as partners of Brandt & Co. they can not be considered such, and it was only in the latter character they had the right to meddle with, alienate, or grant an incumbrance on this property.

There appears no difficulty in regard to the debt due to Lee White, and by him assigned to the plaintiff.

According to the principles just laid down, the plaintiff is entitled to be paid equally with

the simple creditors of Brandt & Co., for the debt assigned him by Lee White, E. P. Johnson & Co., and Ward & Johnson, viz. for the sum of nineteen thousand nine hundred and thirty one dollars, forty cents, and the appellee should pay costs.

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It is therefore ordered, adjudged and decreed, that the plaintiff be placed on the tableau of distribution of the late firm of John Brandt & Co., as simple creditor, for the sum of nineteen thousand nine hundred and thirty-one dollars, forty cents; and it is further ordered, that the appellee pay the costs of this appeal.

CARPENTIER vs. HARROD & AL.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The appellee requires this appeal should be dismissed, because the petition, citation and transcript of the proceedings were not filed in this court, on the return day fixed by the judge of the inferior court.

The appeal
will be dismissed,
if the record be not
brought up on
the return day.

The act regulating the mode of bringing up causes to this tribunal, directs (1 *Martin's*

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Digest, 442) that the appellant shall file the record on the return day. Consequently, without the consent of the opposite party, it cannot be done on any other.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

Hennen for the plaintiff, *Grymes* for the defendants.

ETZBERGER vs. MENARD.

A person, who binds himself jointly and severally, is a principal, and cannot use the pleas which the law gives to sureties alone.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court.

This is an action on a bond for the prison bounds, given by one L. F. I. Lefort, whom the defendant joined as a surety.

He pleaded the general issue—that the bond is utterly void, and can produce no effect, as it was given without any consideration—that at the time of its execution, Lefort was in no legal custody, having been arrested on a *ca. sa.* issued against one Lafour, grounded on a judgment obtained by the then and present plaintiff, against one L. F. I. Lafour.

There was judgment for the plaintiff, and the defendant appealed.

It is urged, that the defendant, being only a surety of Lefort, cannot be bound more strongly than his principal, and may avail himself of the same causes of nullity, and oppose the same exceptions. *Civil Code*, 432, art 2; that judgment could not have been obtained against Lefort, in the original suit, which was instituted against Lafour, against whom judgment was given, and the *ca. sa.* issued on which Lefort was arrested.

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The record of the original suit, in which the bond was given, comes up with that of the present, and it appears that the then defendant was there designated by the name of Lafour.

The sheriff proved the execution of the bond.

His deputy deposed, that the person, who subscribed it with the present defendant, was the one who had been cited by the name of Lafour, in the original suit, and then declared that there was a mistake in the name, but did not deny his owing the debt—that the said Lefort is the person on whom the writs of *fi. fa.* and *ca. sa.*, in the original suit, were served, and he left the bounds immediately after executing the bond.

Henderson deposed, he called on the defendant in the original suit, *Etzberger vs. Lafour*,

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before its institution—that he admitted the debt, urging only his inability to pay it. He saw the person he speaks of brought into court, on a writ of *habeas corpus*, in the said suit.

Vignaud, a witness for the defendant, deposed, he knows the person whose signature is above the present defendant's, in the bond sued on; the witness has often seen him write, and has corresponded with him; he always wrote his name L. F. I. Lefort, and was always so called.

Chabaud testified to the same purpose.

The defendant does not appear to us entitled to relief on the merits. He bound himself *jointly* and *severally* with the person arrested as defendant, in the original suit. He bound himself as a principal, and cannot avail himself of exceptions, which the law grants to sureties alone.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Hoffman for the plaintiff, *Carleton* for the defendant.

JENKINS vs. NELSON'S SYNDICS.

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APPEAL from the court of the first district.

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MARTIN, J. delivered the opinion of the court.

The plaintiff's claim of privilege, as a builder, is resisted on the ground that the contract on which it accrued was not registered in the office of the recorder of mortgages, until three months after its date.

A building contract must be registered, according to the provisions of the act of 1813.

There was judgment for him, and the syndics appealed.

The act of 1813, c. 29, 1 *Martin's Digest*, 704, requires that all liens of any nature whatever, having the effect of a legal mortgage, shall be recorded *within ten days*. That of February 18, 1817, provides, that in all cases exceeding \$500, no architect, or any other workman, shall enjoy, with regard to a third party, any privilege, or legal mortgage, unless he shall have entered into a written contract, and the same shall have been recorded *within the time* prescribed by law.

The plaintiff's counsel urges that the contract, having been recorded under a judge's order, under the provisions of the statute, *Civil Code*, 453, art. 63, has effect against third

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persons, from the day of the record: whilst the defendant's counsel urges that the act of 1817 requires that contracts of this kind be recorded under the act of 1813, *within ten days*.

In *Lafon vs. Sadler*, 4 *Martin*, 476, we held that the notarial act was only the evidence of a fact from which the plaintiff's privilege resulted; in the present case the writing is of the very essence of the appellee's.

Lafon having built Godwin's house, had *ipso facto*, by law, a tacit lien. His having reduced to writing the contract, which fixed the manner in which the house was to be built, and the payment effected, did not *create* his right. Having a lien by law, and made a contract which did not modify his right, he was allowed to avail himself of his stronger title, that which resulted from the law.

Here the plaintiff's lien is not independent from the writing; for the writing is of the very essence of it. On the writing, although no lien be mentioned therein, the law raises a lien, which the contract would not give (even if it was stipulated) without being reduced to writing.

Lafon's notarial act was not necessary to his recovery, therefore, Godwin could not re-

sist its introduction. Here the writing is essential to the plaintiff's recovery, and the defendant may resist its introduction, unless it has been recorded according to law.

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JENKINS
vs.
NELSON'S SYN-
DICE.

The writing here is perfectly of the nature of most of those mentioned in the act of 1813. Securities furnished by tutors, persons employed in the service of the state, marriage contracts, judgments, awards: instruments in which no mortgage is stipulated for, but in which the law raises a tacit one.

The statute of 1817 is not evidence that the legislature, of that year, thought that the intention of that of 1813 had been mistaken in the case of *Lafon vs. Sadler*; but it shews that they discovered that the former act required to be amended. For they left the operation of the decision in that case in its full effect, on cases of building contracts, under the value of \$500.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the rule taken on the defendants on the 8th of March last, to shew cause why the house should not be sold for cash (or so much there-

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DICS.

of as shall be necessary) to satisfy the plaintiff's claim, be discharged: and it is further ordered that the defendants pay costs in both courts.

Hoffman for the plaintiff, *Carleton* for the defendants.

BEEBE vs. ARMSTRONG.

A citizen of another state, praying for the removal of a suit to the court of the U. States, must shew that the plaintiff is a citizen of the state in which the suit is brought.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. The plaintiff stating himself of the parish of New-Orleans, brought suit against the defendant, whom he stated to be of the state of Alabama. The latter, stating himself a citizen and inhabitant of that state, filed his petition for the removal of the suit into the court of the united states, for the district.

The plaintiff averred, that he was and always had been a citizen of the state of Massachusetts, and opposed the removal.

The suit was ordered to be removed, and he appealed.

His counsel urges, that the parish court erred, as it was no where stated that he is a

citizen of this state. 3 *Dallas*, 382, 4 *id.* 8, East'n District. May, 1822.
 2 *Cranch*, 126, 4 *id.* 46.—Farther, that the
 fact is not made to appear to the satisfaction
 of the court. 3 *Johnson's Reports*, 145, 3
Day's cases, 16, 194.

The act of congress (1789, *cap.* 20, *sec.* 12,) under which the removal was prayed, describes the suits in which such an application may be successfully made. Suits against aliens; suits, by a citizen of the state in which the suit is brought, against a citizen of another state.

The defendant avers himself to be a citizen of another state; *ergo*, the suit can be removed only on the ground of the plaintiff being a citizen of this.

The defendant does neither shew, nor even allege, that the plaintiff is such a citizen; but he contends, that this sufficiently appears from the plaintiff's petition, in which he is stated to be of the parish of New-Orleans.

This is the very case which was determined in the supreme court of the united states, in the case of *Bingham, plaintiff in error vs. Cabot & al.*, 3 *Dallas*, 382, cited by the plaintiff's counsel.

The parish court was left to infer, that the
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plaintiff is a citizen of this state, from the sole circumstance of his having described himself as of the parish of New-Orleans.

This circumstance shews, that he is a resident, or inhabitant of that parish, and consequently of this state. The conclusion of the court could only be justified on the ground of citizenship being co-extensive with residency or inhabitancy. An alien does not become a citizen of, by a residence within, the united states; neither does a citizen of New-York acquire the citizenship of Louisiana, by a residence within this state. Either the alien or citizen of New-York, may reside in the parish of New-Orleans, and be correctly described as of that parish.

As nothing in the plaintiff's petition, or that of the defendant's, for a removal of the suit, shews that the former is a citizen of this state, and as this citizenship is a *sine qua non*, in the defendant's application, the parish court erred in directing the removal of the cause.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the suit be remanded, with directions to the judge, to proceed therein according to law, as

if no petition for a removal had been filed; and it is ordered that the defendant and appellee pay the costs of this appeal.

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May, 1822.

BEEBE

vs.

ARMSTRONG.

Hoffman for the plaintiff, *Grymes* for the defendant.

WESTOVER & AL. vs. AIME & WIFE.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This action is brought by Angelique Westover, wife of John Bredy, and by the children and heirs apparent of said John Bredy, viz. by Philip Bredy, by Marianne Bredy, and Rosalie Bredy, the two latter authorised by their husbands Auguste Daniel, and John Sassman.

When a person owning property in this state, does not appear at the place of his residence for five years, and has not been heard of, his presumptive heirs may cause themselves to be put in possession of the estate which belonged to him, and they enjoy a portion of the revenue.

They claim to be put in possession of a tract of land, belonging to their father, John Bredy, whom they state to have disappeared in the year 1805, without leaving any one charged with the management of his concerns.

Their right yields to the testamentary heir, and both to the claim of the husband and wife, who wish to continue the partnership. If heirs in dividing the property of their ancestor, held in common, pass an act of sale to each other, it will be regarded not as

And aver, that one Aimé and wife have illegally entered on, and taken possession of the premises, and though often requested, have refused to give them up.

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WESTOVER
& AL.

vs.

AIME & WIFE.

a sale, but as a partition.

The child who has approved of the partition since he came of age, cannot maintain an action on the ground that it was illegal.

Husband has authority without his wife, to proceed to the partition of the moveable part of a succession accrued to her.

The right of the presumptive heirs, to receive the revenues of his ancestor, who has disappeared, is a personal interest, and does not partake of the reality.

The defendants pleaded the general issue, prescription, collusion, and title through John Sassman, the husband of Rosalie Bredy, which title they assert he acquired from the other plaintiff's in this suit.

The facts of the case, so far as they are necessary to be stated, are those which follow—

John Bredy disappeared in the year 1803.

On the 15th of July, of that year, the commandant of the second German coast, in obedience to an order of the governor, Don Manuel Salcedo, made an inventory of his property, and placed it in the hands of his wife for safe keeping. The 16th September, 1805.

A. Westover, Philip Bredy, and A. Daniel, and John Sassman, in right of their wives, Marianne Bredy, and Rosalie Bredy, petitioned the judge to order a sale of all the property belonging to the absentee. A sale was ordered in the usual form, the parties giving security. On the 18th October, the same persons came before the judge, and by public act partitioned the land now claimed. Two arpents in front, with the ordinary depth, were allotted to Sassman, husband of Rosalie Bredy, for the sum of \$1500; three to Auguste Daniel, husband of Marianne, for the same

price; and the remaining two to Philip Bredy, East'n District. May, 1822.
 for \$950; the act was not signed by Sassman's wife, nor by Daniel's. In a little more than two years after the division, Sassman sold the portion received by him, to one Francois Rulle, in whose right the defendants now claim it.

WESTOVER
 & AL.
 vs.
 AIME & WIFE.

Philip Bredy was of the age of majority in July 1807, Marianne in July 1809, and Rosalie in the same month of the year 1811.

The main question for our consideration is the effect of this act of partition. It is insisted by the defendants, that it amounts to an alienation of all right which the plaintiff's had in the premises.

It is replied that such is not its legal operation; that the act is null and void; that it is not binding on the wife, who, though she might have divided the land, had no right to sell it; that for the same reason it can have no effect against her children, and that as to them, it is null on another ground, they were minors, at the time it was made; and were not parties to the act.

When a person owning property in this state, does not appear at the place of his residence for five years, and has not been heard

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of, his presumptive heirs may cause themselves to be put in possession of the estate which belonged to him, and they enjoy a portion of the revenues on certain conditions.

Their right yields to the testamentary heirs, in case there are such, and both are postponed to the claim of the husband or wife, who may wish to continue the partnership, and have the benefit of the acquets and gains.—*Civil Code*, 16, art. 9, 11 and 13. But either wife or husband may have the community dissolved if they choose, and though the wife, in the first instance, desires to have it continued, she preserves the right of afterwards renouncing.

In the case now before us, there can be little doubt, that it was the intention of the wife of Bredy to dissolve the community. The question is, whether that intention has been so carried into effect, as to be binding. The wife and children, it is said, could not sell the absentee's property. This is true. But as the act contains evidence that they contemplated to sever their interests in the land now sued for, and as that act does divide it, and assign a portion to each, we must give the instrument effect, as far as the parties had le-

gally a right to act on the subject matter; *ut res magis valeat, quam pereat*. The court recognised this principle, and acted on it in the case of *Holmes vs. Patterson*, 5 *Martin*, 693.

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WESTOVER
& AL-

TS.
AINE & WIFE.

According to *Pothier*, if heirs pass an act in relation to property, held in common between them, and declare that the one has sold to the other; though by the terms used, there is no doubt but it is a contract of sale;—*néanmoins la jurisprudence a établi que nonobstant les termes de vente dans lesquels cet acte est conçu, il ne devoit pas être considéré comme un contrat de vente, mais comme un acte tenant lieu de partage*. *Pothier, Traité de vente*, n. 643. The good sense of this doctrine is obvious, and its application to the case now before us complete.

The wife therefore cannot maintain an action for this property, nor can the son Philip, who has approved of the partition, since he came of age, by selling part of the land, and suffering ten years to elapse since the age of majority, without bringing suit.

The claims of the daughters, Marianne and Rosalie, have yet to be examined.

The right which they had as heirs apparent of their father, to enter into and enjoy a portion of the revenues or a portion of his es-

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WESTOVER
& AL.

vs.
AINE & WIFE.

tate, has been transferred by their husbands.

It becomes, therefore, necessary to enquire if they had authority to do so. According to the case of *Tregre vs. Tregre*, 6 *Martin*, 665, the husband is authorised, without his wife, to proceed to the partition of the moveable part of a succession accrued to her, but not to that portion which is immovable. This part of the case then turns on ascertaining what species of property the wife had in that which was divided. It must be confessed, that it is somewhat anomalous, and that it is difficult to class it. To make it a deposit, as was contended, it must be shewn to be gratuitous. *Civil Code*, 410, art. 4, 9 *Martin*, 485. It is not a usufruct for the definition of that right,—is the enjoyment of a certain thing, the property of another, and drawing from the same, all profit, utility, and advantage, which it may produce. It is not a lease; for that is a contract by which one has the use of property for a certain rent to be paid. After as much reflection as we can bestow on the subject, we think it partakes more of the nature of a moveable, than an immovable. It is a right to receive money for a certain number of years, given by law, with a double object; to benefit the presumptive heir, and to compensate him for adminis-

tering the estate of another. It can scarcely then be distinguished from interests which are certainly personal, money due for services, or rents and annuities. *Civil Code*, 100, art. 25.

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May, 1822.

WESTOVER
& AL.
vs.
AIME & WIFE.

Under this view of the subject, the judgment of the district court must be reversed, and ours be for the defendant, with costs.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that there be judgment for the defendants, with costs in both courts.

Hennen for the plaintiffs, *Mazureau* for the defendants.

DAIGRE vs. RICHARD.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The petition stated the plaintiff to be the true owner of a tract of land in the parish of Baton Rouge (bounded on one side by the land of the defendant, and on the other by that of Daigre, deceased) of 179 acres or more, having occupied and possessed it for thirty years and upwards, whereby he acquired a legal title

Parol evidence of the plaintiff's possession cannot be rejected on the ground that the survey, annexed to the record, did not appear to be made with the defendant's privity.

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DAIGRE
vs.
RICHARD.

by prescription ; that the defendant well knowing it, entered illegally, and forcibly, on fourteen and one half acres thereof, of which he retains possession, keeping out the plaintiff, cutting down trees, and doing other injury to the land. The petition concluded with a prayer that the plaintiff might be declared to be the legal owner, be restored to his possession, and recover damages.

The defendant pleaded the general issue, and that he (and not the plaintiff) was the legal and true owner of the premises.

There was judgment for the defendant, and the plaintiff appealed.

The case is before us on a bill of exceptions, *viz.* :

"In this case, the plaintiff offered evidence to prove that he was in peaceable possession and occupation of the land, the subject of the present suit, for more than thirty years ; and that it was forcibly taken possession of by the defendant, in January 1821. The court refused to hear this evidence, because it did not appear that the survey of said land, being the one annexed to the record, was made with notice to the defendant."

"To which opinion the plaintiff begs leave to except. *R. Lawes, D. J.*"

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DAIGRE
vs.
RICHARD.

If the survey was made without the knowledge of the defendant, this was a good reason for refusing to admit it as evidence *per se*. If one was absolutely necessary in the case, it should have been ordered.

If the defendant had desired it, the plaintiff might have been ruled to describe the premises more particularly. The answer, however, shews that the defendant well knew the land claimed.

The evidence offered was relevant and material, and ought to have been heard.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and the case remanded, with directions to the judge to proceed to trial, and to allow the plaintiff to introduce the evidence stated in the bill of exceptions. The costs of the appeal to be borne by the defendant and appellee.

Preston for the plaintiff, *Gurly* for the defendant.

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May, 1822.

CANONGE vs. CAUCHOIX.

CANONGE
vs.
CAUCHOIX.

APPEAL from the court of the parish and city of New-Orleans.

Notice of non-payment must be given on the day which follows the protest.

MARTIN, J. delivered the opinion of the court. This is an action on a promissory note, protested on Saturday, the second of August, 1820—notice was given to the endorser, the defendant, on Tuesday the fifth. There was judgment for him, and the plaintiff appealed.

The parish court was correct in deciding, that, as the endorser resides in New-Orleans, he ought to have had notice on Monday the 4th, the day following the protest, the intervening Sunday being excluded. *Chitty on Bills*, 326, *Am. ed.* 241, *Smith vs. Mullet*, 2 *Camp.* 208.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Grymes for the plaintiff, Seghers for the defendant.

LOMBARD vs. GUILLIET & WIFE.

East'n District.
May, 1822.

APPEAL from the court of the third district.

LOMBARD

vs.

GUILLIET &
WIFE.

MARTIN, J. delivered the opinion of the court. The plaintiff, stating that the defendants owe him \$778 on a note, for the security of which the husband mortgaged a house and lot, part of the wife's dowry, which, by their marriage contract, he was authorised to sell and alienate, with her consent, prayed and obtained an order of seizure. His petition concluded with a prayer that the defendants might be cited, and that he might have such other relief as the case required.

The wife, being thereto authorised by the court, (by a curator *ad litem*, she being a minor) pleaded the general issue and nonage.

She admitted in her answer, that she signed the note; but averred she was not bound thereby, because she signed it without the authority of her husband; because she thereby appears to have bound herself in the same contract, with him: because it did not turn to her benefit; that she never consented to the mortgage given by her husband.

There was judgment against the husband, and for the wife, and the plaintiff was perpe-

A party who is named in a notarial act, but whose signature is not thereto, is not bound thereby.

A wife is not bound by a note, on which the name of her husband is written above hers, where his signature is denied and not proved.

The supreme court cannot take as evidence what the court *quo* states in the judgment.

The wife is not bound by a note executed jointly with her husband.

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May, 1822.

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LOMBARD

vs.  
GUILLIET &  
WIFE.

tually enjoined from proceeding on the order of seizure. He appealed.

The wife's counsel have been heard *ex parte*.

The marriage contract authorises the husband to sell and alienate the house and lot, with the consent of the wife.

The mortgage deed states, that the wife was present, and declared that she consented thereto—but her signature does not appear to it—she denies that she consented to the mortgage, and there is no evidence of her doing so.

The district court was therefore correct in making the injunction perpetual.

We do not enquire into the correctness of the judgment against the husband, as he did not appeal, and did not appear in this court.

There is no evidence of the authorisation given by the husband to the wife—none results from the note, because it is not proven to have been subscribed by the husband. It is true his signing is alleged in the petition, but it is denied by the wife, who pleaded the general issue, yet admitted her own signature. The husband did not appear in the district

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court, no judgment by default was taken against him—and although the judge states in his decree, that the plaintiff proved his demand against the husband, this does not appear from any other part of the record. *Longer & al. vs. Pigeau*, 3 *Martin*, 221.

The district court grounds its judgment on the absence of any proof that the note was given for the benefit of the wife. The decision, in this respect, is in conformity with ours in the case of *Durnford vs. Gross & wife*, 7 *Martin*, 489.

It is therefore ordered, adjudged and decreed, that the judgment be affirmed with costs.

*Davezac* for the plaintiff, *Seghers* for the defendants.

**NORRIS' HEIRS vs. OGDEN'S EX'S**

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court.

The petitioners aver that they are the heirs of Patrick Norris, deceased, who died in this

East's District.  
May, 1822.

LOMBARD

vs.

GUILLIET &  
WIFE.

A partnership to carry on business as iron-mongers, is not a special or corporate partnership.

In an ordinary partnership, dissolved by the death of one of

East'n District. city, leaving a large estate—that he made  
*May, 1822.*

**NORRIS' HEIRS** a last will and testament, appointing G. M.  
*vs.* **Ogden, Andrew Lockhart, and Rowland Craig,**  
**OGDEN'S EX'S.** his<sub>s</sub> executors, and that G. M. Ogden, acting

the partners, the in collusion with the house of Harrod & Og-  
 heirs of the de- dens, of which he is a partner, had the whole  
 ceased partner stock in trade of said Norris adjudged much  
 have a right to participate with the survivors in below its real value to that firm, and that Pe-  
 the liquidation. ter V. Ogden, in whose name this purchase

Therefore, if a suit is com- had been made, took possession of all the  
 menced by one of the partners to recover a goods sold them, and collected the debts due  
 debt due the partnership, the other partners the succession.

intervene—*aliter* They further aver that Peter V. Ogden was  
 if they have a a partner in the house of Harrod & Ogdens,  
 joint interest that this sale was null and void, and they pray  
 with the defend- judgment for the value of the store and the  
 ant.

Pleadings should not be judgment for the value of the store and the  
 argumentative monies collected.  
 or loaded with  
 extraneous mat-  
 ter.

Peter V. Ogden died since the transaction complained of, leaving his widow, Francoise Duplessis and G. M. Ogden his executors, who have answered this petition severally. The widow first pleaded the general issue, and that her husband had paid the heirs of Norris—the others, to the general denial, added that they had accounted to the house of Harrod & Ogdens, for the amount claimed, and concluded by averring that the executors



of Norris had duly accounted for all monies arising from the succession of P. Norris.

East'n District.  
May, 1822.

To these pleas the plaintiffs replied, that nothing demanded in the present petition made a part of the charges against the executors, in the court of probates, and that what was done there could not be pleaded in bar, unless it was approved of by the petitioners, or decreed in a suit to which they were parties.

NORRIS' HEIRS  
vs.  
OGDEN'S EX'RS.

The petition of intervention, the rejection of which has given rise to this appeal, is in the name of the surviving partners of the house of Harrod & Ogdens, and of the executors of the late Patrick Norris; it asserts that for several years previous to the day of the said house was in partnership with the late Patrick Norris, in a hardware store, for equal shares of profit and loss; that Norris died, leaving the persons already mentioned his executors; that they, Harrod & Ogdens, being greatly interested in the settlement of the partnership concerns, applied to the court before which this cause originated, to have their rights as partners ascertained; that they were recognised as such by a decree of that court, and supposing themselves duly authorised by that decree, they retained, by permission from the

East'n District. executors of Norris, the proceeds of the sale  
 May, 1822.

of the store; and that they have paid debts  
 NORRIS' HEIRS due by Norris, or rather by the partnership  
 vs. of Norris, Harrod & Ogdens, conducted un-  
 OGDEN'S EX'S. der the name of Patrick Norris, to an amount  
 equal to these proceeds.

That the petitioners well knew these premises, and that the whole had remained in possession of Harrod & Ogdens; yet they commenced an action in the court of probates against the executors, and forced them by this measure to make out an account in which they charged themselves with the proceeds arising from the sale of the effects of Norris; that the present demand is for the same sum, which the plaintiffs now contend, in a suit pending in the court of probates, is in the hands of Patrick Norris, but that the persons, really accountable, are Harrod & Ogdens. By reason of these premises, they request leave to be made parties, and pray that this action may be enjoined until a final settlement of the accounts of P. Norris' estate, and Harrod & Ogdens.

To this petition the plaintiffs filed several exceptions. That the petitioners in the bill of interpleader, viz. the representatives of P. V.

Ogden, were already defendants, and had answered in the action; and that they could not intervene, in a suit to which they were already parties, and had pleaded. That G. M. Ogden, who is at one and the same time, executor of P. V. Ogden, Patrick Norris, and partner in the house of Harrod & Ogdens, can protect the interest of that firm—finally, they deny any balance to be due Harrod & Ogdens, and conclude by alleging that the inventory made after Norris' death, was fraudulent.

East'n District.  
May, 1822.

NORRIS' HEIRS  
vs.  
OGDEN'S EX'X.

The court cannot avoid noticing the manner this record is made up. The pleadings on the part of plaintiff are drawn in a very loose manner, argumentative, and full of irrelevant matter, which has no other effect but of increasing costs, and rendering it difficult to find the material facts. The notice now taken of this irregularity will, no doubt, prevent any thing of the same kind appearing hereafter.

The plaintiffs insist that this was a special, or corporate partnership, and that they have a right to settle its affairs. We do not think it either

Not special—that is, for one particular transaction—this was for business as iron-mongers, and for an indefinite period of time.

East'n District.  
May, 1822.

NORRIS' HEIRS  
vs.  
OGDEN'S EX'S.

Not corporate—that is, where the dormant partner contributes only a certain sum, and by agreement, is to have a certain share in the profits and losses, without being answerable for the latter beyond the amount brought by him into partnership: but here we have not discovered that any such stipulation existed.

It appears to us an ordinary commercial partnership, dissolved by the death of one of the partners, in the liquidation of which his heirs have a right to participate with the surviving partners, and until a partition takes place, if one of the partners sues to recover a debt due the former firm, we have no doubt the others may be made parties for the assurance of their rights.

If the defendant, in this suit, did not represent the succession of one of the late partners in the house of Harrod & Ogdens, the petitioners would have a right to intervene. But it is expressly stated, that Peter V. Ogden was a partner in that house; consequently Harrod & Ogdens have an interest directly opposed to any judgment being rendered against the defendants. On the ordinary principles then, on which petitions of intervention are received, that now before us must be rejected.

A stranger to a suit cannot be received on record, to aid others in the defence of it. The prayer for an injunction, contained in this petition, is one which, on the facts stated, would have come with as much propriety from the defendants; but with what success, we do not say.

East'n District.  
May, 1822.

NORRIS' HEIRS  
vs.  
OGDEN'S EX'rs.

Why the executors of P. Norris wish to be made parties, we cannot discover. As plaintiffs, they have no right—as defendants, how can they be affected by what takes place between the plaintiffs and the succession of P. V. Ogden.

The court sees that the object of this suit, is to make P. V. Ogden's estate responsible in the first instance, to the heirs of Norris. The matters in defence to this demand, will come more regularly from the defendants, than from another party in the shape of a bill of interpleader.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with cost.

*Livingston* for the plaintiffs, *Seghers* for the defendants.



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LAFARGE

vs.

MORGAN & AL.

LAFARGE vs. MORGAN & AL.

APPEAL from the court of the first district.


*Hennen*, for the defendants. On 26th March, 1821, the plaintiff sold to S. Packwood, a plantation in the parish of Plaquemine, "with the warranty (as the deed declares) of all debts, gifts, mortgages, evictions, alienations, & other incumbrances whatsoever." The certificate of the recorder of mortgages, however, produced at the time of sale, shews that the plantation was subject to an incumbrance in favor of Albin Michel and his wife, of \$55,000; and to a general mortgage in favor of a judgment creditor, to the further amount of \$1021 87 cents. The vendor declares in the deed, he had already paid \$22,666 66½ cents, of the sum of \$55,000, leaving due to Michel and his wife, only the sum of \$32,333 33½ cents: and the other mortgage of \$1021 87 cents, he obliges himself to cause "to be cancelled as soon as possible." Nothing is said relative to the cancelling of the mortgage of \$55,000; nor on the subject of that part of it, which Lafarge declares, had been paid by him, to A. Michel and his wife, who were the vendors of the plantation to him.—

Conventional sequestrators, acting without compensation, are subject to the same obligations as depositories.


And, when it appears from the facts, in the cause, that they were agents for both parties, their duty was to hold the object placed in their care, until both consented it should be given up, or a court of justice decided which had the better right.

A person, who receives property to keep without reward, is responsible only for gross negligence in keeping it, or fraud in refusing to give it up.

Hence, where A received notes drawn by B, in favour of C, and by the terms of the contract, was to deliver them to the payee, when certain incum-

At the time of purchase of this plantation, (26th East'n District. March, 1821,) by S. Packwood, there was *May, 1822.*  
 pending, and now is pending, a suit instituted   
 by John Lafarge, against A. Michel and his **LAFARGE**  
 wife, for the purpose of obliging them to raise **vs.**  
 the mortgage of \$55,000, reserved by them on **MORGAN & AL.**  
 this plantation, to the extent of \$22,666 66 $\frac{2}{3}$  branches on the property, for which they were given, were raised; held that if B forbid A, to deliver them, A was not responsible in damages, though B might, in case he had not a sufficient reason  
 cents, then paid as the vendor declares; the The certificate of the recorder of mortgages, is prima facie evidence of the truth of what is expressed in it.  
 record of this suit was given in evidence at It may be contradicted, but it is not sufficient to destroy its effect, to shew that it was recorded on irregular testimony.  
 the trial, and now forms part of the statement Unless marriage contracts are recorded under the act of 1813, they do not affect third persons.  
 of facts. The pendency of this suit was no- It is not necessary for the validity of a renunciation by a married woman at a sale of her property, that it should be done under oath.  
 tice to S. Packwood, of the controversy be-  
 tween his vendor, and Albin Michel and his  
 wife, relative to this mortgage on the plan-  
 tation, now about to be purchased by him.—  
 By law he was required to take notice of the  
 suit. *Newland*, 506, 3 *Martin*, 393. And what  
 the law required him to take notice of, he ac-  
 tually knew. Further, S. Packwood was  
 bound to look at the conveyance of this plan-  
 tation, made by Albin Michel and his wife, to  
 the plaintiff; for in the deed made by the lat-  
 ter, reference thereto is had in express terms.  
 Notice of the controversy between the plain-  
 tiff, and A. Michel and his wife, and of the  
 contents of their deed to him, are brought  
 home directly to S. Packwood. Under these

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circumstances, and with these facts, even the plaintiff himself did not require S. Packwood to part with the endorsed and negotiable notes which had been agreed upon, as the price of this plantation: "he agreed," to use his own words, "that he would deposit with the defendants a like sum in the said notes." For what purpose this deposit was made, the receipt of the defendants will shew. It is in the following words:—

"Received, New-Orleans, March 26, 1821, of J. Lafarge, the notes of S. Packwood, endorsed by G. Dorsey, to the amount of fifty-five thousand dollars. The same being part of the notes mentioned in the bill of sale, of a plantation sold by Lafarge, to S. Packwood; held until the mortgages on said plantation are raised by said Lafarge, and when the said mortgages are raised, the notes to be restored to Mr. Lafarge. But the notes to be returned in proportion as the mortgages are raised, so that no more in amount is to be retained, than remains of the mortgage uncanceled."

Five days after the date of this receipt, the defendants, the depositories, were required by the plaintiff, to deliver up to him \$38,633 33 $\frac{1}{3}$  cents, of these notes, which they

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refused to do: and thereon he instituted against them this suit; averring that they had not performed the condition of the deposit, which they undertook when the said notes were deposited in their hands; and for the violation of the trust of deposit on their part, he avers he has suffered damages to the amount of \$10,000, for which he claims a judgment; and at the same time, prays that the notes may be restored to him.

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They answer, and confess, that the receipt was given by them, and that they hold the notes mentioned in it; but considering themselves as stakeholders, or depositories, both of J. Lafarge and S. Packwood, they cannot give up the notes until the plaintiff has complied with his agreement to cancel, and raise the mortgages on the plantation. And as S. Packwood had previously notified them not to hand over the notes, inasmuch as he considered the incumbrances as still existing on the plantation, they answer, that in discharge of their trust, as depositors, they cannot yield up the notes, but with his consent. They deny all the other allegations of the petition of J. Lafarge, and put him upon the strict, full and legal proof thereof. S. Packwood,

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being made a party to the suit, by the answer of these defendants, avows that he gave the aforesaid notice to them; and avers that the mortgages existing on the plantation, at the time of purchase, still remain in full force; and therefore, that they are bound as depositories to return the notes, and that the plaintiff has not a right to demand them until all mortgages and incumbrances are raised.— Such is an abstract of the pleadings on which the parties went to trial; and the defendants having been condemned by the jury, in direct violation of the charge of the court, have appealed to this court for redress.— A statement of all the evidence given to the jury accompanies the record, and on it this court is called upon to pronounce.

As the plaintiff has chosen to resort to the defendants alone, without making S. Packwood a party to his action, it is requisite that the court should investigate attentively the character in which they stand in this transaction. They aver that they have no interest whatever in retaining the notes; and it clearly appears from the evidence, that it is a matter of total indifference, as far as regards them, into whose hands those notes may be

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placed. They are not entitled to any commission or charge for their trouble or responsibility in keeping the notes; the undertaking, therefore, on their part, was gratuitous. The plaintiff in his petition, has repeatedly styled their undertaking a deposit. What was the nature and kind of this deposit, then becomes an important question, preliminary to every other enquiry. Our *Civil Code*, 411, considers deposits as of two general kinds: the deposit, properly so called, and the conventional and judicial sequestration. The present deposit, with the defendants, was the result of an agreement, as the plaintiff states in his petition; and was to serve as a security, that the mortgage of \$55,000 should be cancelled. This agreement could have been made with no other person than the purchaser of the plantation, and this security must have been for his benefit alone. The defendants were not interested in the transaction, were mere stakeholders; or in the language of our *Civil Code*, they were conventional sequestrators. The two parties, then to this agreement of deposit, were the plaintiff, and S. Packwood, the purchaser of the plantation: and this, the plaintiff had agreed to do

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in order to afford S. Packwood, his vendee, a security for quiet possession, and to comply with the general guarantee in his deed, against "all debts, gifts, mortgages, evictions, alienations, and other incumbrances whatsoever."

Having then conclusively settled the relative situation of the contracting parties, as respects this deposit: the next inquiry will naturally be into *the nature and extent of the undertaking* assumed by the defendants, when, as depositories, or conventional sequestrators, they receipted for the notes. In the words of the receipt, the notes were to be *held until the mortgages on said plantation are raised*, "and when said mortgages are raised, the notes to be restored," but the notes to be returned "in proportion as the mortgages are raised." The notes then were not to be returned so long as mortgages to the amount of \$55,000 should incumber the plantation, and not be raised; but whenever J. Lafarge should raise the mortgages then incumbering the plantation, below the amount of the notes deposited, then no more of the notes were to be retained than should be sufficient to serve as a security for the mortgages remaining to be raised: so that

if at any time it should appear that the plantation remained incumbered only with a mortgage of \$30,000, then \$25,000 of the notes should be given up to J. Lafarge; and so on, in proportion.

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But who was to be the judge, or to decide when the mortgages had been raised, according to this agreement made by J. Lafarge with S. Packwood, for his security against the incumbrances which were known to exist at the time of purchase? Assuredly the depositories, the defendants, never intended to take such responsibility on themselves. Nor is there any thing to countenance the supposition that S. Packwood ever intended to trust to their judgment on a point of so much importance to himself; a point which might require a profound knowledge of the very intricate law of land titles in this state. But *there is evidence* before the court amply sufficient to shew that both parties contemplated a decision by a court of justice on the subject of the claim of Madame Michel on this plantation. For, at the time of purchase, such suit was pending. Evidently then, until S. Packwood should express his consent, the defendant could not, with propriety or justice, hand over

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the deposit, or any part of it, to J. Lafarge.

They have professed, on the record, their willingness to do so; but this, far from satisfying

the plaintiff, is considered as a ground of complaint against them. But let us examine what duty the law imposed on these conventional sequestrators, when the vendor demanded the notes, and the purchaser notified them to retain them. It was then, I assert, their duty to refuse them: their duty to hold them as they have done: and I trust this court will support them in this course of conduct. In the case of a deposit, properly so called, where the depositor voluntarily, for his own benefit only, makes the deposit; and not as in the present instance, for the *security* of a third person, in *compliance with an agreement*; that is in the common deposit, no restoration can be required where there has been an attachment on the property, or an *opposition made on the owner*. *Civil Code*, 415, art. 25. Now here, prior to the institution of the suit, an attachment for \$25,000 and upwards, was laid on these notes by a creditor residing in New-York: and moreover, an opposition was made by S. Packwood, to any disposal of them in favor of the plaintiff. But the obligation of the defendants, as conven-

tional sequestrators, was still more formal and express. The notes, by agreement of plaintiff, had been placed in their hands for the security of S. Packwood, and, therefore, they could not, in defiance of his opposition, deliver them to J. Lafarge, when the difference existing between the two parties interested remained undecided. The one contending that he had raised the mortgages; the other maintaining that they were yet in full force. *Civil Code*, 419, art. 40. *Ferrari's Bibliotheca*, verbo "*Depositum*," n. 4. *Partida*, 5, 3, 5. 1 *D'Espeisses*, 240, n. 29. *Pothier's Pandects*, 16, 3. sec. 3.

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Without pursuing the defence further, I might rest the case of the defendants here. For, it appears that they have complied with their obligation, *in refusing to part with the deposit*. Whatever may be the claims and pretensions of the plaintiff, it is not against the defendants that they are to be urged. He mistook his action most egregiously, when he attacked the depositories. Against S. Packwood, his real adversary, should he have instituted his suit, if he intended fairly to come at the merits of his claim.

Let us, however, suppose, for the sake of ar-



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gument, that the plaintiff had satisfied S. Packwood, his vendee; that his plantation was unincumbered; that the defendants, without any excuse, had violated the contract of deposit, and refused to deliver up the notes; what, in such case, could have been the remedy of the plaintiff? To make the case stronger against the defendants, let it be granted that these notes, none of which are yet due, and some will not be due until several years, were money. Nothing more could be recovered than the amount of the notes, \$55,000, with judicial interest, at the rate of 5 per cent. per annum, from the day of the institution of the suit. *Civil Code*, 41, art. 18. To the restitution of the capital only with interest, could the defendants be compelled; and in no case would they be responsible for any damages which the delay of payment might cause the depositor. But here the notes deposited, none of them yet due, are held by the defendants, ready to be produced whenever they can part with them without risk. They undertook a friendly office towards both parties; a gratuitous office which should never be the cause of damage to them, while acting with good faith. *Partida*, 5, 3, *in præmio*. *Partida*, 5, 3,

10, note of Lopez, n. 3. *Officium suum non debet esse depositario damnosum.* But, using the utmost severity of the law against them, under the facts presented by the evidence, taken in the most unfavorable view, the defendants cannot be condemned to pay damages, and also to the restoration of the notes. Where the thing deposited produces fruits, both the deposit and the fruits are to be restored; where money has been deposited, interest and the capital shall be paid, but no damages. Only in case of the loss of the thing deposited, through gross negligence, can damages be claimed; and then only as a compensation for the value of the deposit. *Civil Code*, 415, art. 18. 1 *D'Espeisses* 232, n. 8. *Institutes Justin*, lib. 4, tit. 6, liv. 17, with the gloss. *Dig.* 16, 3, '1, sec. 1, 2 and 4. *Pothier's Pandects*, 16, 3, n. 51. But where the deposit is ready to be produced, and can be restored unimpaired, the depository can be condemned to the restitution only (*in simplum actio depositi datur contra depositarium*) with costs of the suit. This principle of law is fully established by the authorities last quoted: they were read and insisted upon at the trial of this cause, and the plaintiff's counsel was invited to confute the prin-

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ciple, if in his power ; or to produce a single authority, where the depository, in the voluntary deposit, when he confessed the deposit and had it ready to restore, could be condemned both to the payment of damages and the restoration of the deposit. *This he has not done*, after a month's leisure for the purpose. In fact, the principles of the Roman law, following professedly the law of nature, are too well established on this point ; and it is in vain for the gentleman to attempt to shake them by ridicule, argument, or broad assertion. For fraud only is the depository answerable ; on that ground only does the law give an action against him. And so far is this principle carried, that if the depository should deliver the thing deposited, into the keeping of a third person ; and through the fraud of the latter, it should be lost, in such case the original depository would be discharged of all responsibility towards the depositor on ceding his action against the third person. *Digest*, 16, 3, 16, *with the gloss*. See also the translations of this text made by *Hulot* in French, and *Rodriguez* in Spanish. 1 *D'Espeisses*, 236, n. 28. From this latter view of the subject, it is evident no damages could be given against the defen-

dants, however great the amount of them might be proved on the part of the plaintiff. But in fact, he has not produced evidence of any damages; not a syllable is said on the point by a single witness. And if the court should be of opinion, contrary to the proposition advanced by me, that a depository is bound to restore the thing deposited unimpaired, and to pay damages likewise, nominal damages only could be decreed on the principle of the cases, in 10 *Martin*, 687, and 5 *Martin*, 193.

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I have heretofore argued this cause, as if the defendants had no cause for their refusal to restore the notes; as if the notification given to them by S. Packwood, to retain them was without foundation. Should I not have already satisfied the court, that this action is unfounded, and the plaintiff mistaken in the remedy he is in search of; it will not be difficult, I trust, to make it evident, when the reasons of S. Packwood's notification are considered. In his answer, S. Packwood avers, that the mortgages existing on the plantation, at the time of purchase, have never been raised, and that the plantation still remains incumbered to an amount larger than \$55,000,

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and therefore insists that the notes should be retained in the keeping of the conventional sequestrators, until the incumbrances are raised. The plaintiff, on the other hand, avers, that the incumbrances then existing have been raised, and that the plantation is subject only to a mortgage of \$16,366 66 cents, and he therefore prays that a sufficient amount of the notes being retained to serve as a security against this incumbrance, the balance may be restored to him with \$10,000 damages and costs—as the plaintiff maintains an affirmative proposition, on him lies the burthen of proof. *Ei incumbit probatio qui dicit, non qui negat.* D. 22, 32. As vendor, the plaintiff must shew that he has complied with the warranty, under which he sold; and that the plantation is free from “all debts, gifts, mortgages, evictions, alienations, and other incumbrances whatsoever.” *Exceptio contractus non impleti ex parte actoris non a reo ipsam proponente, probanda est, sed ab actore; ex contractu veluti impleto agente, implementum probari debet, et summa ratione. Totum enim actoris fundamentum in contractu ex parte sua impleto, consistit; necessario propterea implementum illud ab adversario negatum probare debet.* Ferrari's *Bibliotheca*, verbo



"*Emptio*," art. 5, n. 66. *Tom.* 3, 244. It follows then as a corollary, that the plaintiff in this action must prove satisfactorily to the court, that S. Packwood, the purchaser of the plantation, is in no danger of eviction from any claim against it at the time of sale. And this, independently of any separate agreement for the deposit of notes, to serve as a security against the mortgage, which was known to the parties at the time of contract. So this court expressly decided, refusing to give the vendor of an estate judgment for the purchase money, while it appeared there was on it a mortgage, to the payment of which the purchaser might be exposed, though no suit on it had been instituted. 3 *Martin*, 236, *Duplantier vs. Pigman*, *ibid*, 247. *Clarke's executors vs. Farrar*. 5 *Martin*, 625. *Dreux's executors vs. Ducournau*. The authority of these three solemn and consentaneous decisions is attempted to be shaken by the *obiter dicta*, used in the course of the opinion delivered by judge Derbigny, in the case of *Fulton's heirs vs. Griswold*, 7 *Martin*, 223. The justness of the judgment rendered by the court, in this last case, cannot be questioned after an examination of the facts. But the reasoning of the

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judge, against the opinion which *Domat* founds on a text of the Roman law, is inconclusive, and in opposition to three former adjudications of the court above cited, in which the judge himself had concurred, and against the English text of our *Civil Code*, 360, art. 85, as well as against the whole current of authorities, *Roman, French, and Spanish. Code Napoleon*, n. 1653, 13. *Pandectes Françaises*, 95. *Domat*, 1, 2, sec. 3, § 11. *ibid. sec. 2*, § 22, note, (q.); 1 *D'Espeisses*, 26, n. 1, *Tertio*; 1 *Automne*, 284, 2 *Automne*, 408. *Julien, Eléments de jurisprudence*, 303, n. 16. *Digest, lib. 18, tit. 6, liv. 18, sec. 1*, with *Godefroy's note*, n. 31, and the gloss thereon; *Code, lib. 8, tit. 45, liv. 24*, with *Godefroy's comment and the gloss. Ferrari's Bibliotheca, verbo, "Evictio,"* n. 60. *Castillo, lib. 4, cap. 42, n. 72-76.*


As the counsel for the plaintiff have said nothing below controverting these authorities, it may be taken for granted, that whenever the vendee can establish the existence of outstanding incumbrances on the property which he has purchased, tending to shew that he may be troubled in his possession, the vendor cannot enforce the payment of the purchase money. To shew then the evidence of such danger shall be the object of my succeeding observations.

The first and prominent incumbrance existing on this plantation, is that of \$55,000, which was created by the act of purchase by J. Lafarge in favor of A. Michel and his wife, (a copy of which sale and mortgage forms part of the statement of facts) and which was certified to be in full force at the time of purchase from the plaintiff, by S. Packwood. This same mortgage of \$55,000, or any part of it, Mrs. A. Michel refused to cancel, raise or annul, though J. Lafarge alleged that he had paid a very considerable portion of it, and that A. Michel, her husband, had given his discharge therefor in his favor (see the suit instituted by *J. Lafarge vs. A. Michel and his wife*, on the 18th August, 1820, (n. 3484, *District Court*) forming a part of the statement of facts.) The counsel who now advocates the cause of the plaintiff, avers in his petition, that "without the signature of Madame Michel he cannot procure the discharge of the said mortgage." This suit was known to S. Packwood, when he purchased from the plaintiff: he had not only constructive notice of it, (*Newland on Contracts*, 506. 3 *Martin*, 393) but had read it and communicated it to his counsel, and that counsel thought, with the

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counsel of Lafarge, that "without the signature of Madame Michel he could not procure the discharge of the said mortgage." That counsel, moreover, then considered, and now considers, the renunciation made by Madame Michel, as insufficient, and that it would require a very formal signature on her part to discharge the mortgage which she held on the plantation. But, all at once we find, without any explanation of the reasons, a different opinion is held by the plaintiff and his counsel: it is not thought necessary to obtain any decision on the suit then pending; the signature of Madame Michel is no longer requisite. A certificate can be obtained from a notary public (without any authority, by the by, on his part to grant it) that some one made a declaration (whether true or false) that he, and not Madame Michel and her husband, was the last holder of the notes, and as such had given a release of the mortgage. But will this court countenance such an attempt to entrap the purchaser as this? He looked for a real release and discharge of this mortgage from Madame Michel, as he had every inducement to believe would be obtained on the suit then pending; or otherwise, before he

could take the risk of purchasing this plantation on the simple guarantee of J. Lafarge. It is urged now seriously, in opposition to his former opinion, that Madame Michel has no claim of any kind whatever on this plantation: and he has really displayed much gallantry in defending Madame Michel from that odious conduct, which he considers the defendants would make her guilty of, if she should urge any such claim. I agree that Madame Michel is "a lady of the highest respectability;" but surely it would be no blemish on her fair character, to urge a legal right in a court of justice, for the purpose of reserving from the wreck of the fortune of her husband, now a bankrupt, a support for herself and children. If such conduct would be odious in the eyes of the counsel, in what terms will he express himself against her, for her conduct in refusing to join in the release made by her husband, of the incumbrance which Lafarge alleges he had paid? And above all, where will he find words to characterise the defence set up to the action instituted and now pending against her by Lafarge? I deem it almost necessary to apologise to the court for making an answer to such kind of objections;

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for the *respectability* of suitors is not to be weighed in the balance of justice, but the legality of their pretentions. To this alone then will I confine myself. The plaintiff's counsel insists that it is incumbent on the defendants to shew conclusively the existence of the incumbrances: it has been shewn most conclusively, that at one time they did exist; and the plaintiff has attempted to shew that he has removed them. The removal of an incumbrance, or mortgage, presupposes its anterior existence; that then must be taken for granted on all sides. Now, for the proof of its removal. The plaintiff produces, not any certificate that the judgment creditor had been satisfied; not even the certificate of the recorder of mortgages, that the judicial mortgage had been cancelled. There is no evidence then of any kind that that incumbrance has been removed. But a certificate of the recorder of mortgages is produced in evidence, (not under seal) that the mortgage on the plantation in favor of A. Michel and his wife for \$55,000, had been reduced to \$16,366 66 $\frac{2}{3}$  cts. since the date of the sale to S. Packwood. Without cavilling at the irregularity of this certificate, it is admitted that it is *prima facie*

evidence of the removal of the incumbrance ; East'n District.  
but it is no more : and can be gone into, as May, 1822.  
well as shewn to have been given erroneously ; or on insufficient evidence, &c. &c., as was  
solemnly settled by this court. 5 *Martin*,  
625. *Dreux vs. Ducournau*. The defendant  
shews by the records of the recorder, on what  
authority he had given this certificate. It  
was solely on the certificate of a notary public,  
that a person had appeared before him and  
declared that he was the last holder of the  
notes which Lafarge had given for the  
purchase of the plantation from A. Michel  
and his wife ; that the notes had been  
paid, and therefore, that he had released the  
mortgage. Now, in the first place, by what  
law is a certificate of a notary proof of any  
act passed before him ? In the next place,  
could the register, or a court of justice, take,  
in any case, the certificate of a notary, instead  
of the copy of the act itself ? Would this  
court, or any other court, notice the certificate  
of a notary, stating the contents, or purport  
of an act passed before him ? No ; nothing  
but a certified copy of the act itself would  
suffice ; for the certificate of a judgment  
is not sufficient ; a copy must be shewn.

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2 *Martin*, 245. *Kershaw vs. Collins*. But this is not all: had copies of the acts been produced, what would they have proved? Not the actual payment of the incumbrance: the only evidence, or certainly the best evidence of it, should be in the hands of the plaintiff: the notes themselves which had been given and *paraphed* to identify them with the sale. These notes, if ever paid, should be in the hands of the plaintiff. But where are they? He does not produce them; and the only reason that can be assigned for it, is that in fact he has never paid them. The very point put in issue by the general denial and other part of the pleadings, was payment or not? On the plaintiff alleging it, was it, therefore, incumbent to prove it. But in this he has entirely failed, by not producing the notes themselves. Another question naturally arises, in the absence of these notes; *did A. Michel and his wife ever indorse or pass them away?* The plaintiff has proved that A. Michel and his wife did negotiate a part of the notes: but are they the notes which he alleges he has paid off? The attempt to shew that the incumbrance has been cancelled to a certain extent, is professedly made by virtue of

the act of the legislature of 1817, *page 60, sec.* East'n District.

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3. Without taking any of the various objections to the want of the fulfilment of the formalities of the act which might be made, such as *the memorandum of the circumstance* at the foot of each of the notes, not being complied with, *unless the notes had been negotiated*, as the 3d section requires, such cancelling would be of no avail, nor afford any security to a future purchaser. Had these notes been obtained illegally from A. Michel and his wife, no authority would be given to the holder of them to release the mortgage. All these objections, and many others which might be made, was I not afraid of appearing captious, and of tiring the patience of the court, should have been removed by the plaintiff; since, if his allegations are true relative to the payment of the notes, it was in his power.

But, independently of this incumbrance of \$55,000, retained by the act of sale from A. Michel and his wife, to the plaintiff, which, I think, it has been shewn, has not been legally and duly cancelled, so as to authorise the court to support this action; there is another incumbrance on the plantation, that arising from the marriage contract of Madame Michel.

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A copy of the marriage contract between Madame Michel and her husband, and evidence of the payment of her dot, to her husband, was produced. To destroy the effect of this, the plaintiff's counsel have taken two grounds; 1st, that the marriage contract can have no avail against third persons, because no proof has been given that it has been registered agreeably to the provisions of the act of 1813, (1 *Martin's Digest*, 700,) and 2d, because Madame Michel made a formal and effectual renunciation of all her rights against the plantation, when sold by herself and husband, to J. Lafarge. Let us examine these grounds in order. 1st, The marriage contract is null, says the plaintiff because no proof has been shewn that it has been recorded. According to the Spanish laws in force at the time the contract was made, (*A. D.* 1808,) Madame Michel has a tacit mortgage on all the estate of her husband, for the restitution of her dowry. *Part.* 5, 13, 23. And this extends not only to the property in his possession, but to that which he sold subsequently to the receipt of the dowry. 6 *Martin*, 688; 3 *Martin*, 390, *Casson vs. Blanque*. Such was the effect of the contract when passed. Could



any legislature subsequently, without violating the obligation of the contract, say that it should not have its former effect, unless one of the parties should record it? Plainly not: such law would be unconstitutional. But, 2d, it is said Madame Michel renounced those rights, by the act of sale. Let us see then, if that renunciation is in form and valid. I say it is not. It is a general renunciation, without reference to any particular law, which is bad. 1 *Martin*, 281: 2 *Colom*, 141. The renunciation, moreover, is not valid for want of the oath required by the Spanish law. 2 *Colom*, 141; *Seguenza*, 68, n. 13, *idem*. 69, n. 17, 2 *Febrero* (*edt.* 1818,) 97, n. 121. And it is not sufficient that the oath should be put in the act, but it must have been actually administered. 2 *Febrero*, 96, n. 120. And the notary should certify the fact. *Ibid.* As Madame Michel, also appeared in this act as surety for her husband, a special renunciation of the 61st law of *Toro*, was requisite for its validity. Since the Spanish law, when not repealed by the acts of our legislature, is in full force, the court is bound to pronounce that an act without these formalities is not valid. These requisites were not introduced from the canon

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law; but are as much a part of the Spanish law, as any part of the *Partidas*. In every contract where married women are parties, correct notaries always complied with them, more particularly with the formality of the oath. I conclude then, that Madame Michel has never renounced, in due form of law, the tacit mortgage which she held on this plantation for her dotal rights. The marriage contract makes all the future estate of Madame Michel dotal; the property therefore, inherited from her father, since her marriage, and alienated in part to Lafarge was dotal, and not paraphernal property, as is stated in the act of sale. For the amount then of the money brought in marriage, \$11,000, and for the amount of the property, alienated \$15,000. Madame Michel can exercise her right of mortgage, on the estate purchased by the plaintiff, and now in the possession of S. Packwood. Or Madame Michel may demand a restoration of the specific dotal property alienated.

It is worthy of remark, that the plaintiff undertook to have the mortgages on this plantation cancelled, before he could demand \$55,000 of the purchase money: it is for him

then clearly and satisfactorily to establish beyond doubt, that the incumbrances have been removed. It is for the plaintiff to shew the very notes which he alleges he has paid; to prove that they have been negotiated, if he has paid them to any other persons than the mortgagees; and to give S. Packwood the evidence effectually to resist any demand which might be made by Madame Michel; with the evidence now on record, what defence could Packwood make against an action on the mortgage for \$55,000, by A. Michel and his wife? For all that this court has seen, the notes, or a greater part of them, may yet be in the hands of Madame Michel and her husband: certainly, no proof of their payment has been made. Without the notes, and with nothing but the certificate of the notary in our hands, what kind of defence would Packwood make? None at all; judgment would be rendered against him in spite of all of the certificates spread on the record. And with the knowledge of the dotal rights of Madame Michel, brought home both to Lafarge and Packwood, what defence could be set up on the ground that the marriage contract was not recorded? Let the answer be

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taken from the decision of this court, in the case of *Casson vs. Blanque*, 3 *Martin*, 390-3.

Or if a decision should be given in the suit now pending, of *Lafarge vs. Michel and his wife*, in favour of the defendants, and recognising the right of Madame Michel, to claim on the mortgage of \$55,000, what would be the situation of Packwood? A judgment in the present action would not shield him: for, though Packwood, in his answer, has called Madame Michel in to defend the suit, she has not thought proper to make any appearance; and no judgment by default could be taken against her, as has lately been contended, because a copy of the petition and citation, in the French language, has not been served on her; and because no judgment by default can be taken where the subject in controversy is laid.

Without insisting on the written agreement to cause the different mortgages on this plantation to be raised, the principles of law, heretofore quoted, shew that Packwood could not be compelled to pay the purchase money, if suit was now brought against him on the contract of sale. The danger of trouble and eviction is greater in the present instance.

than in that of *Duplantier vs. Pigman*, 3 *Martin*, East'n District. May, 1822.

236. In that case, a small portion of a lot in the faubourg was sold, and the remainder of the estate was in the possession of Duplantier to satisfy the mortgage; here, the whole of the estate is alienated. Here too, we shew the actual insolvency of A. Michel, by making his *bilan*, filed subsequently to the institution of this suit, a part of the statement of facts.—

After a fair consideration of all the facts attending this suit, can the court give assent to the assertion of the plaintiff's counsel, that an iniquitous scheme has been meditated against the vendor of this estate, to obtain possession of it, and at the same time to retain a large portion of the purchase money? The purchaser has already paid \$50,000, on this estate; can it then be supposed that it could be any object to him to hinder the circulation of the notes for \$55,000, not due for years yet? Or that the endorser, G. Dorsey, could have any interest in such a scheme? Is not the reverse of the picture drawn by the plaintiff's counsel, a true representation of the transaction? Is it not apparent that Lafarge wishes to get these notes without performing what the purchaser intended to oblige him to

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do, before he would consent to give them up? If nothing more was to be done by the plaintiff than to get his friends to go before a notary, and make a declaration, and thereon obtain a certificate, which should raise the mortgages, why give security to the amount of \$55,000, that it should be done? All this might have been accomplished in the course of a few hours. No; Lafarge wished to avoid a decision in the suit he had brought against Madame Michel and her husband, to raise the mortgage. He was then afraid of the judgment, which he knew would be pronounced on it; and therefore, down to the present day, he permits the suit to remain pending. J. Lafarge appears to be no novice in land speculations: on this record, we have proof, that he heretofore sold a large tract of land, in the state of New-York; and the purchaser has instituted an attachment suit against him, and actually attached to the amount of twenty-five thousand dollars, of the notes of Packwood, to indemnify him against a defect in the plaintiff's title. That suit too, is now pending, and forms a part of the statement of facts; (see the record of *Ruggles vs. Lafarge*, filed on the same day the present suit was instituted.)

One ground of damages alleged by Lafarge, East'n District.  
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MORGAN & AL. no evidence has been shewn that he has suffered any damage, in consequence of the disappointment. His former partner, at home, does not appear to have placed much confidence in his return, as on the record, we have an attachment against these notes by him, to the amount of about \$8,000; (see the record of the suit, *W. D. Patterson vs. Lafarge.*) The institution of these two attachments was urged before the jury, as a consequence of the defendants' refusal to give up the notes. It has not been urged here, because this tribunal would perceive that the argument might be rather used against the plaintiff. To sum up the argument; the depositories are not liable in this suit, for damages; if any had been proved; all that could be obtained against them, would be the restoration of the notes; and the verdict of the jury, for damages could not authorise the court to form a decree, but barely to enter up judgment for the amount. The remedy has been mistaken by the plaintiff; Packwood, the real person interested, and for whose benefit and security the agreement

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of deposit was made, should have been sued; but even now, ample reasons have been shewn by him why these notes should be retained in the hands of the conventional sequestrators, for his security against trouble and eviction, from the mortgages and claims existing against the plantation at the time of purchase; mortgages which have not been legally proved to be cancelled; claims which it is evident may be successfully urged, for aught that has yet appeared, and which at this moment are the subject of litigation. Should the matter appear merely doubtful, the defendants, who seek a shield from damages, should be absolved, rather than be exposed to a double loss. *In pari causa damno magis quam lucro consulendum.* But when the court weighs deliberately the testimony, the scales of justice, it is confidently believed, will not find the defendants wanting.

*Livingston*, for the plaintiff. The want of title appears only in the answer of Packwood; he says he directed the defendant, Morgan, to keep the notes, inasmuch as the mortgages have not been raised, *nor the title thereto rendered complete*; but as no other defect in the title has

been even suggested in argument, than the pretended incumbrances, I shall take notice of this defence, only to shew the pre-determination of the defendants in this cause, no matter on what unfounded pretence, to deprive the plaintiff of his property.

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It is alleged that there were other incumbrances on the property besides those recited in the deed, and that the defendants were directed by Packwood not to deliver the notes until those incumbrances were removed.

On this subject it is worthy of remark, that this defence never occurred to the defendants at the time they chose to break their engagement, nor for a long time after. After the plaintiff had incurred considerable expense, and made great sacrifices to pay off the notes, he procured the certificate of the proper officer, and presented it to the defendants as evidence that he had complied with the condition on which he was to recover a large portion of the notes. To his utter astonishment, they refused to comply. To give more form and solemnity to the transaction, and to make them record their reasons for this extraordinary conduct, he sent his papers by a notary au-

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thorised to recover his notes. The demand was made; and then, if ever we should expect to hear the true reason why they were detained, let us listen to it. They say "that the mortgages having been granted to Albin Michel and his wife, they were not satisfied with the releases granted by the holders of the notes, but required that the same should be released by Albin Michel and his wife, and that they would not give up possession of the notes in their obligation specified, or of any part of them, until the incumbrances granted by John Lafarge in his act of purchase of said plantation, should have been raised by Albin Michel and his wife." Here then we have the original and only ground for the refusal, not a word of any other incumbrance but that created by John Lafarge in his act of purchase; not a syllable of any objection but to the mode of cancelling the mortgage by the holders of the notes.

Even when the answer is filed, not a single other incumbrance is distinctly referred to. But the answer to the petition gradually enlarges the ground taken in the answer to the notary. That answer, we have seen, goes be-



yond the contract, by saying, that although the mortgage was cancelled by the holders of the notes, they would not give up those they held, until Michel and his wife had also cancelled it. In the answer to the petition they advance another step—the mortgages must be released to the satisfaction of Packwood, and he must authorise them to give them up.

It is not until the hearing, that after full reflection, we are informed, that neither the answer in the protest nor the answer on record, contains the true reasons of the refusal. It is not until then, that we hear of a tacit mortgage of Mrs. Albin Michel, for her dotal and paraphernal rights; and of the defendants' duty to retain the notes, until these and all other incumbrances, they may please to dream of, are released.

I ask the court to consider these circumstances, and determine whether this change of ground is not strong proof that they found untenable that which they had at first occupied. Whether truth can consist in such variety: It is proverbially single: error, on the contrary, is infinite. A single good reason is worth a dozen bad ones, and better than a

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The defendants, for a reason I shall state, wanted to keep the notes out of circulation: having no good reason at hand, they thought of a bad excuse for doing so, and wishing to strengthen it, every effort made it worse.

Let us return, however, to the ground which they thought of last, and on which they seem to place the greatest reliance, *viz.* that there are other incumbrances existing on the land besides those created by the plaintiff.

The incumbrance pretended, is that of Madame Michel. To support it, they shew that she had, on her marriage, property to the amount which she brought in dower, and some paraphernal property to the amount of

But is this enough? For aught that appears to the court, Madame Michel may, at this day, have all the property which she had at the day of her marriage, or at any time since; and this idea is strengthened by the circumstance that Madame Michel has been made a party to this suit, and has not either then, or at any other time, ever said that she had any such claim. The burthen here is on the defendant. He must shew that the incum-

brance exists: he must convince the court that if it exist, it is a justification for him. The wife has a mortgage, not for what she brought in marriage, but for that part of it which she loses by her husband's default. She cannot keep the property and the mortgage both. As she has never made any claim, as she is silent, even when judicially called on; the legal presumption is, that she has retained her property, or is satisfied to look to the rest of her husband's estate for what is wanting; and the truth is, that she has such security, and that we have furnished it; for, with the money we paid for the plantation, the property at the bayou was purchased, which is in Michel's *bilan*.

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But whatever may have been the situation of the property, that lady had a better reason for waving her claims.—She had, by a solemn act, with a full knowledge of her rights, renounced them; and it appears to me, that the defendants are making a most unwarrantable use of her name, when they employ it to screen themselves from the consequences of their breach of contract, by supposing that she could be guilty of entrapping the plaintiff into contract, under a feigned release, to receive

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his money, and then ruin him by an enforcement of her claims: they ought to have produced the clearest evidence, that she intended to do this, before a conduct so odious can be presumed, and on the part of a lady of the highest respectability.

The renunciation is attacked on the authority of *Beauregard vs. Piernas*, 1 *Martin*, 281; but no two cases can be more different; the court there determine, that from what was certified by the notary, it appeared that he was himself ignorant of the law which the wife was made to renounce. She only renounced all the laws of *Toro* in her favor, without shewing that she knew what particular advantage she renounced. Here I think there can be no doubt, from the attestation of the notary, that the wife was fully informed of all her rights, and deliberately renounced them.

I make no answer to the argument drawn from the canon law, to shew the necessity of an oath to bind the renunciation.

Even this renunciation was not necessary, inasmuch as there was no lien, the mortgage having never been recorded.

But is it enough for the defendant to shew that a tacit mortgage once existed, and if he

do, must the plaintiff, at his peril, prove that it has been cancelled? I apprehend not. When a purchaser bargains for an estate, it is natural that he should make these inquiries, and satisfy himself as to every doubt in the title. But after he has purchased, if he wishes to avail himself in any way of an incumbrance he may discover, his situation is then changed; he must shew clearly, not only that it once did, but that it still does exist; otherwise, no seller would be safe; every buyer could, under this pretence, avoid the payment of the price; no property scarcely, even in this new country, has passed through less than ten or twelve hands, since the first grant.—The tacit mortgages of wives and minors, may be preserved by absences, and repeated occurrences of minority, for an hundred years; the purchaser then has nothing to do in order to avoid his payment, but to shew that some sixty or seventy years since, the great-grandmother of the vendor, and his minor wards of the grandfather had a tacit mortgage, and call on the seller to produce evidence that they have been cancelled; and all this, although before the purchase, he was perfectly apprised of every link in the title.

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To look no further than the present case, it appears that this plantation was bought by Michel, from the syndics of John Blanque; his wife must have had claims; she is known to have brought her husband a large fortune. S. Packwood, therefore would be justified in putting Lafarge to a suit, and force him to prove judicially that Made. Blanque was paid, although that lady never made any claim; although Packwood was apprised of all the circumstances at the time of the sale.

Again, before Blanque, it belonged to John Gravier. I will not detain the court by detailing all the inquiries which this name, so well known in the temple of Themis, would give rise to. But I conclude, that even if we were contending with Packwood, which we are not, the court would say to him, if he used any such pretence to delay his payments—Sir, your defence is not just; you knew when you bought this property, that Madame Michel, Madame Blanque, and the wives of all the other proprietors, through whose hands it has passed, had once a tacit mortgage on the property; if you thought there was risk in buying land, at the uncertainty of the release of their claims, you should either have abstain-

ed from making the purchase, or have apprised Lafarge that you would not pay him till he produced evidence of the release; or at any rate, you should have returned the property if you were not satisfied with the title. You keep his plantation, you receive the profits, and you retain the price; this is unjust, and looks like something worse, unless you prove that you are in real danger. Shew that one or both of these ladies claim something from the land. Shew that they have menaced with a suit, or at least that they have said, they have a claim. But you have done neither. You have shewn the very reverse; for you have judicially called on Madame Michel, and she has told you, by suffering a default, that you had no right to doubt her honor, or to injure her by the supposition, that she would gain-say her solemn renunciation.

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Such, it appears to me, would be the language of the court to Packwood. But what will they say to the defendants, who are strangers to the contract of sale, and who must be judged by the terms of the agreement which they have entered into?

That agreement is precise. It is a receipt for the notes, and a promise to return them on

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a certain condition. If that condition has been complied with, they are liable to our action; if it has not, then we have brought it without cause, and our complaint must be dismissed. The condition is, that "the notes are not to be returned until the mortgages on the said plantation, are raised by the said Lafarge," and when the mortgages are raised, the notes to be returned to Lafarge; but the notes to be returned in proportion as the mortgages are raised. So that no more in amount is to be retained, than remains of the mortgage uncanceled:—

The first inquiry is—what mortgage?—The defendant now says, (though I think that is shewn to be an after thought, and not like other second thoughts, the best) he now says, the tacit mortgage of Madame Michel; but as I trust we have shewn there is no such mortgage; this would be a sufficient answer.

The defendants' counsel says, that it was intended to include the mortgage of Madame Michel, by the general words of the receipt. Whatever may have been the intent of the gentleman who drew the instrument, I will undertake to prove to demonstration, that the instrument itself will not admit of this con-

struction, and that neither J. Lafarge nor G. Dorsey understood it so. In the deed to Packwood, two mortgages are mentioned; one of fifty-five thousand dollars, the other of one thousand dollars (a judicial mortgage) nothing is said about any guarantee against the \$55,000 conventional mortgage; most probably because it was understood that Lafarge would deposit the notes to that amount. But, the judicial mortgage he promises (not to take up, but to warrant the purchaser against) and with this warranty he appears to be content.

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After the sale the defendants receive precisely the amount of the conventional mortgage, \$55,000, and promise to return them when the mortgages are raised by J. Lafarge. They are to be returned in proportion as the mortgages are raised: so that no more in amount is to be retained, than remains of the mortgage uncanceled. Now, from this phraseology, two things result, both incompatible with the idea that any other than the mortgages recited in the deed were intended; 1st, the mortgage intended in the receipt must be a mortgage that can be cancelled; consequently it must have been registered, or at least written—it can never apply to a tacit mortgage.

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You may release such a mortgage; but, nothing that is not written can be cancelled.

Secondly—the mortgage intended by the receipt must be one equal in amount to 55,000 dollars; because it is stipulated that the notes, which amount exactly to that sum, are to be returned in proportion as the mortgages are raised; so that no more is to be retained than remains of the mortgage uncanceled. Now, tho', if this was intended of mortgages to the amount of 60,000 dollars, a proportion might be established between the notes returned and the monies paid on the mortgages; yet the remaining part of the obligation cannot apply to any other than the proven mortgage of 55,000 dollars. There must be no more retained than remains due, after the payment of part of the mortgage. This is possible, if they intended the mortgage of 55,000 dollars; it is impossible they meant any other: for instance, suppose Madame Michel's tacit mortgage to amount to 35,000 dollars; the mortgage recited in the deed to 55,000 dollars, here we have an aggregate of \$90,000. Lafarge, in pursuance of the receipt, pays \$30,000: the defendants must then deliver him notes to an amount equal to the proportion which his pay-



ment bears to \$90,000, the whole sum due, that is to say, one-third. They must give him \$18,333, which is the 3d of \$55,000; but by the terms of the receipt, they are to retain the amount that remains of the mortgage uncanceled. But there remains of the mortgage canceled on this construction, \$60,000: therefore, out of \$55,000, they are to give \$18,333, and to retain \$60,000. It is demonstrated, therefore, that by the terms of this agreement, the parties could have contemplated only the mortgage of 55,000 dollars. If it be objected that the plural "mortgages" are used, I answer, that the last time, it is used in the singular only; and that as there must be an inaccuracy in one or the other, because they cannot both agree, we may as well suppose the inaccuracy to have taken place in the first instance, as in the last.

Should it be further said, that there were actually two mortgages, I answer, that the judicial one for 1000 dollars is specially warranted against, which is not the case with the 55,000 dollars; and therefore, it would seem that no deposit was intended to secure the purchaser against that. In addition to this, we may reasonably suppose that the purchaser

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would take a deposit of 55,000 dollars, and the seller's guarantee of 1000, for a sum of 56,000 dollars; but not that he would take that deposit for more than 80,000 dollars, without even an express guarantee for the surplus.

The plain, express, unequivocal meaning of the receipt is, that the mortgage to be cancelled was the mortgage of 55,000 dollars. Did the parties understand it differently? Not Lafarge most certainly; he could never have consented to suffer so large a sum to remain in the hands of the defendants, until he could perform the impossible task of cancelling mortgages which never existed, and of producing proof that all the wives of the different proprietors through whose hands the land had passed for the last century, had released their tacit mortgages. He never could have intended to put it in the power of the defendants to retain his property forever. For, that is their construction of the engagement. In their answer they say that they will keep them until the mortgage is released to the satisfaction of Packwood, and he shall authorise them to deliver them. Their engagement then is to be fulfilled, not when justice and their own

promise require, but when Packwood pleases. East'n District.  
This answer is drawn by the counsel who May, 1822.  
drew the agreement, and we are to suppose   
must express his construction; but if he ex- LAFARGE  
plained it to Lafarge, in this sense, before he TS.  
took it, he must have been a mad man to de- MORGAN & AL.  
liver the notes—if he did not so explain it,  
neither Lafarge, nor any other man could ima-  
gine that it contained so different a contract  
from that which the plain meaning of its  
words expressed. Lafarge then, whose ob-  
ject it was in selling his property to get  
possession of the price, certainly never un-  
derstood it, as the defendants' counsel now  
does. Did the defendants themselves under-  
stand it so? Most demonstrably not. First,  
because the plain import is different, and  
when another intent is alleged, the strongest  
circumstances must be shewn (even if the  
rules of law would admit such proof) to prove  
it; but here all circumstances are directly op-  
posed to it. What answer do they give, when  
called on by the notary? One totally incon-  
sistent with the construction now contended  
for. They formed their objection solely on the  
circumstance that the release of the mortgage  
was made by the holders of the notes, and

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not by Michel and his wife, and say that they will not give up the notes, until (that is to say, that they will do it then) the mortgage granted by Lafarge, in his act of purchase, should have been raised by A. Michel and his wife. Is it possible more unequivocally to express a construction of the contract, more directly at war with that which their counsel makes them give in their answer, and with that which he makes for them on the trial; they will give up the notes, when Albin Michel and his wife shall cancel the mortgage given by Lafarge; and yet, in their construction, they were to keep them until all the tacit mortgages whatever, should be released, till Packwood should be satisfied! Till Packwood should authorise them! No, certainly not; your first objection is a very bad one; and I shall shew it to be a very frivolous one; a bare pretext to keep your own name from circulating on the notes;—your first, your only objection, was that the release was not executed by the mortgagee, although you acknowledged (and I pray the court to remark this) you acknowledged, though you now affect to doubt it, that the releases were executed by the holders of the notes. I refer for proof of this, to the answer to the notary.

You never thought of the tacit mortgage as a defence, until after you found the stranger would not submit to imposition—until you found an account was required of your conduct—and that a great commercial name could not keep you from a judicial investigation; then indeed professional talent was called to your aid, and its ingenuity furnished you with the two additional excuses; the necessity of Packwood's consent, and the tacit mortgages; but I repeat, and I think I may now do it without fear of contradiction, that the mortgage mentioned in the receipt, did not, by the terms of the instrument itself, extend beyond the mortgage made by Lafarge, to Michel and his wife, for the 55,000 dollars; and that such was explicitly the meaning of both parties to the contract.

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If such be the case, we have only to enquire whether that mortgage has been cancelled, so as to leave only a few dollars still due.

Of this, we produced the highest evidence the nature of the case was susceptible of; the certificate of the register, stating that fact.—But it is said this certificate is founded on improper testimony, and that although the



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register has certified that there is no mortgage beyond the sum specified, he was not warranted in doing so, until he had the release of the original mortgagee. Now, if we are to take the plain words of our statutes for our guide, it must follow not only that the mode we have adopted of procuring the release of the mortgage is valid, but also that it is the only legal mode of effecting it.

It appears by the sale, that the mortgage in question for 55,000 dollars, was for the securing the payment of that sum, for which promissory notes had been given and marked *ne varietur*; it appears that these promissory notes had been transferred by the mortgagee, and were in the hands of several holders.— Now, who does the defendant want to release the mortgage? Why, truly the mortgagee, a person who had no interest whatever in the debt. One who, if he had done it, would have been guilty of fraud. The moment he passed the notes, that moment the holder became subrogated to all his rights in the mortgage to the amount of the notes, and the mortgagee had no more right to cancel it, than a stranger. Equity would have enforced this, without any positive law; but our legislature wisely took

away any doubt on the subject, by passing the act of 4th February, 1817, by the 3d section of which it is enacted, that the bearers of promissory notes, secured by mortgage, may, on receiving payment, cancel the mortgage to the amount of the notes they hold.— In this case the notes having been passed, the holders of them appeared before the notary, and acknowledged satisfaction, of which the notary gave a certificate, and the register cancelled the mortgage. If any thing can be more strictly conformable to law, I have not the ingenuity to discover it. The case in 5 *Martin*, 625, *Dreux vs. Ducournau*, has been cited as supporting the defendants' argument; but nothing is more fatal to it; the certificate of the register was there declared not to be conclusive. Why? Because it was given on an order obtained in a suit to which the person really interested, was not a party, although the party apparently interested was. Now, in this case, the party really interested, the holders of the notes gave the release; and the defendants contend, that it ought to have been given by the person only apparently interested, viz. the mortgagee.

I make no further remark on the objections

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to the form of the releases granted by the holders of the notes, than a reference to the *Civil Code*, 466, art. 64, by which it appears that all that is requisite for the cancelling of a mortgage, is "the consent of the parties concerned, or having the necessary capacity for that purpose;" now, here the holders were the only parties concerned, and the act gave them the necessary capacity.

The delivery of a copy of the act of release is not made necessary; that provision is made by another article, and applies to the deeds and mortgages.

But if there were any irregularity, by what possible reasoning could it be made to avail the defendants, unless they shew that the mortgage still subsists? But there is no such irregularity; they know the mortgage does not exist. They knew it when they refused to comply with their solemn engagement, and they are bound to pay us the damages we have incurred.

This is the last enquiry—and we were presented on the hearing with an assertion on this head, which I confess, made me smile. We were told that this was a deposit, and that the

depository was liable to no damage, in case he broke his contract : all that could be recovered was the thing deposited. We were not only told this gravely, but I was rebuked for a look of incredulity, with more politeness than I believe my involuntary expression of countenance deserved. We were assured, that strange as it might appear, such, notwithstanding, was the law, and witnesses from all countries, and of all ages, were called to confirm the assertion. *Accursius* and *Ferrari* from Italy ; *Alfonso* the learned, and his commentator *Gregorio*, came like the knight and his squire, from Spain. *Pothier* and *D'Espeisses* poured out the treasures of their Gallic lore, and *Justinian*, with his sages from Byzantium, brought up the rear. Each gave his testimony in his own language, and considering the number of the witnesses, it must be confessed there was a marvellous coincidence in their evidence ; they all, without exception, declared, that the depository was bound to restore the thing deposited when he should be called on ; but, though I listened very attentively, I could hear none of them utter the legal heresy they were called to teach—that, though a man, who made an ordinary promise, should pay

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damages for the breach of it, yet he who undertook the sacred trust of a depository, might violate it with impunity. A man entrusted with another's whole fortune, in promissory notes, or merchandize, or any other effects, (I think the gentleman did except money) might refuse to deliver it when called on; or when forced to a suit, he, the owner, can recover nothing but the deposit; and the faithless wretch who has deceived him is liable to no penalty, if I recollect right, for the reason is the same, not even to costs. Nay, further, that if the depository chooses to transfer the deposit to another of his own choosing, who loses or wastes it, all he can be called on for is to give the unfortunate owner a power to sue for his property. This last ingenious inference is drawn from the *Dig.* 16, 3, 16, and I think solely founded on too incorrect terms. The original is *eatenus eum teneri*, and this is certainly affirmation that he shall be liable so far; but there are no words of limitation to shew that he shall be held no further liable. The case I think supposes that the first depository had, by the terms of the deposit, a right to transfer it, and that he did it in good faith. But certainly, if trusting in a man's honesty, I



deposit my property with him, and he, with gross neglect, gives it to a man of no responsibility, he is as much liable as if he had been guilty of the conversion himself.

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However the law be in this case (and I confess both *Hulot* and *Rodriguez* coincide in their translations, though the *gloss* of *Godfrey* does not agree with them) however, this may be, the law I think is clear from a view of the whole title of the *Digest* referred to by the defendants, that where there is no fraud, there the depository is bound only to restore the deposit, and not even that when it is lost. But wherever there is fraud, he is bound for damages; and that a refusal to deliver the deposit, is considered as fraud, if it be in the defendant's possession, particularly from the following law of that title, *Dig.* 16, 3, 13, *sec.* 1. *liv.* 1. *sec.* 15, 16, 20, 22.

But all this learning on the subject of deposits with which the defence is interlined, is perfectly inapplicable. This is not such a deposit as the authorities relate to; and if it were, he is bound to restore it, unless the person who claims an interest should have made an attachment, or a legal opposition to the delivery. *Civil Code*, 414. *art.* 25.

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This is a special undertaking, by which the person making it must be bound. He has made his own law. He undertakes to deliver up the notes when a certain condition shall be performed. We have shewn clearly that this condition was performed; that we offered legal evidence of that; we made the demand, and apprised the party by a notarial demand, of the damages we should suffer if he delayed the delivery. He refused to comply, and by every rule of law he is liable to pay us those damages. The law on this subject is most clearly with us, and the evidence justifies the amount of damages. The cause was heard before a most respectable jury, chosen by the parties, and if the court think we are entitled to recover at all, they will not, I think, interfere with an assessment made by men every way qualified for the task, and who performed it after a full hearing.

PORTER, J. delivered the opinion of the court. The plaintiff sold on the 26th March, 1820, to Samuel Packwood, a plantation and slaves, for the sum of 110,000 dollars: 25,000 dollars of which was paid in cash, and for the

balance, notes were given, indorsed by Green-berry Dorsey. The act of sale contained; a warranty of all debts, gifts, mortgages, evictions, alienations, and other incumbrances whatever;—a declaration of the vendor, that according to the certificate of the register of mortgages, the land and twenty-nine of the negroes were hypothecated in favor of Albin Michel, for securing the sum of 55,000 dollars; and that he had paid 22,666 dollars 66 cents, in discharge of it. Mention is also made of another mortgage resulting from a judgment, for the sum of 1021 dollars 87 cents.

By an instrument of the same date with the deed of conveyance just stated, the defendants, Morgan, Dorsey & Co., acknowledged to have received of "J. Lafarge the notes of S. Packwood, indorsed by G. Dorsey, to the amount of 55,000 dollars, being part of the notes mentioned in the bill of sale of plantation, sold by Lafarge, to S. Packwood, held until the mortgages on said plantation are raised by said Lafarge, and when the said mortgages are raised, the notes to be returned to Lafarge. But the notes to be returned in proportion as the mortgages are raised, so

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that no more in amount is to be retained than remains of the mortgage uncanceled."

On the 31st of the same month, the plaintiff presented to the defendants a certificate from the register of mortgages, dated that day, which stated that the mortgage granted by John Lafarge, to Albin Michel and Marguerite Cabaret, his wife, by an act passed 21st May, 1819, for the sum of 55,000 dollars was reduced to \$16,366 66 cents; and demanded of them, that the notes placed in their hands, should be delivered up in the proportion that the mortgage had been diminished. To this application, they replied, "that they were not satisfied with the releases granted by the holders of the notes secured by said mortgage, but required that the same should be released by Michel and his wife, and that they would not give up possession of the notes or obligations until the incumbrances granted by Lafarge, in his act of purchase should be raised by those persons."

On the 10th of April following, this action was instituted in which the petitioner demands that the defendants be decreed to give up all the notes placed in their hands, except the sum of 16,366 dollars 66 cents; and that they

be condemned to pay him 10,000 dollars, the damages he has sustained by their breach of contract.

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The defendants answered.—Admitting ; the deposit for the purposes averred in the receipt : averring, that they were ready to hand over the notes whenever authorised by Packwood, and had always been willing to do so—that Packwood had instructed them there existed on the plantation divers mortgages, particularly one in favor of Albin Michel and his wife, and had forbidden them to deliver up the notes to the plaintiff.

That attachments had been levied on these notes ; one at the suit of Samuel Ruggles for 25,000 dollars, and the other at that of William D. Patterson for 6,666 dollars, 66 cents ; and they prayed that S. Packwood, and A. Michel and wife, should be made parties, and that if damages were awarded to the plaintiff, they should be condemned to pay them.

Albin Michel was cited, but did not appear. Packwood made himself a party to the proceedings, and averred that he had expressly directed Morgan, Dorsey & Co. not to give up the notes ; that they were bound as sequestrators to hold them, until all the mortgages



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were raised, and the title made valid, and complete in law; and he prayed that they might be decreed to retain them until the plantation and slaves were discharged from all incumbrances or liens whatever.

The cause was tried by a jury, who found for the plaintiff, damages 4,000 dollars. On this verdict, judgment was rendered that the petitioner recover of the defendants that sum, and that they return of the notes placed in their hands, the amount of 38,633 dollars 33 cents. The defendants have appealed.

The first question to be decided, is whether the appellants are responsible, and liable to pay damages for their refusal to give up the obligations when called on. The second is, should they now be decreed to restore them.

It is a matter, perhaps, of little importance in settling the rights of the parties in this action, whether the defendants are considered depositories strictly such, or conventional sequestrators, as with some slight exceptions, not necessary to be noticed in this case, acting in the latter capacity, without compensation, creates the same obligations, as the real contract of deposit.

If we consider them as sequestrators acting for both parties: for Packwood, who had a great interest to prevent these notes getting into circulation improperly: for Lafarge, to whom it was important that they should not be retained after the incumbrances were raised; their duties may be easily defined: they were obliged to hold the notes until both parties agreed to their delivery, or if they could not agree, until a court of justice decided they should be given up.

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The whole circumstances of the transaction, as proved in evidence, induce us to regard the defendants as conventional sequestrators, and subject to the obligations just stated.

Should we, however, adopt the construction which the plaintiff contends for, that by the terms of the receipt the defendants undertook to return the notes and obligations on the happening of a certain event; and that in doing so they took on themselves the risk of judging whether it had in reality occurred or not, the circumstances, under which they entered into that engagement, must be considered in ascertaining what consequences follow if they committed an error in the interpretation of it. The contract was entirely gratuitous; nothing

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of course will make them responsible, but gross negligence in keeping the property, or fraud in refusing to give it up. No proof of that kind has been made in the suit before us. It has not been shewn they had any interest in holding these notes, or that they acted in bad faith. By the words of the receipt they were to give up the obligations when the mortgages were cancelled. If they gave them up before they were cancelled, they violated their contract, and would have been responsible in damages to Packwood, for whose interest that condition was inserted. In what situation then (according to this doctrine) would these men, acting in good faith, have been placed? Without reward or compensation, made responsible in damages for mistaking the law, in a matter which the courts of justice to whom it is submitted, have found difficulty in settling, after much time has been taken for reflection, and the judges have had the assistance of able counsel to aid their deliberations. This never could have been the intention of the parties, and we are all clearly satisfied the law creates no such responsibility. In regard to Packwood, by whose directions the defendants acted, a different question

is presented, and there is no doubt, that if, without a justifiable cause, he prevented the plaintiff from the enjoyment and use of his property, he is responsible in damages for the injury inflicted.

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The next question is, whether the plaintiff has a right to recover the amount of obligations sued for. The defendant, Packwood, insists that mortgages yet exist on the property, that they have not been discharged, and that he has a right that every incumbrance should be removed.

The opinion which the court has formed on the whole case, renders it unnecessary to examine a point much disputed, whether the terms of the receipt extended to all liens existing on the property, or merely those of which mention was made in the bill of sale.

The plaintiff, who alleges that the liens on this property have been cancelled or released, first presents us with a certificate from the register of mortgages, to establish the reduction of that in favor of Michel and wife. The defendants object that the recorder cancelled the mortgage on irregular and insufficient evidence, and that it still exists. Testimony, such as was introduced here, is not

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sufficient to authorise us to say so. The certificate is admitted on all hands to be *prima facie* evidence of the fact stated in it. It is not conclusive: it may be contradicted. But to destroy the credit attached to it, the party who attacks its verity, must do more than offer proof which leaves that verity doubtful. He must shew it to be false: he must establish that the officer acted on evidence that was untrue, not merely on that which was irregular. The holders of the notes were authorised to raise the mortgages. To prove they did not, the appellant insists that copies of the acts would have been better proof to the recorder than certificates of the notary, of what these acts contained. This is, perhaps, true; but it does not falsify the certificate granted by the recorder, that the holders of the obligations had, in fact, raised the mortgages. And we do not see that there is any good cause for the apprehensions expressed, that Michel and his wife may, at some future time, shew these mortgages have not been released. The law makes the recorder responsible, if he errs from design, or from negligence; and if the party in this case dreaded, that this responsibility was not a sufficient guarantee, he should have



offered proof sufficient to authorise us to declare the certificate untrue. In the case of *Dreux vs. Ducourneau*, 5 *Martin*, 625, the decree of the parish court, which was the only foundation for the certificate of the register, was shewn to have been granted in a suit where the mortgagee was not a party.

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The lien, proceeding from the dower, brought by Mrs. Albin Michel into marriage, is presented as an objection to the petitioner succeeding in this action.

By an act of the legislature, passed in the year 1813, 1 *Martin*, 700; all marriage contracts of this city, are directed to be recorded in the office of recorder of mortgages; and if not recorded agreeably to the provisions therein contained, it is declared, they shall be utterly null and void, to all intents and purposes, except between the parties thereto.

This law is said to be unconstitutional, in requiring acts made previous to its passage, to be recorded. No reason was offered in support of this position, and we have not been able to find any. It impairs not the obligation of a contract, it only prescribes a certain formality to give it effect. If the legislature could not regulate matters of this kind, they

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could not control the forms of proceedings in our courts of justice, nor pass a law in relation to any thing which already had existence.

A good deal was said on inconveniences that must ensue if the provisions of this act were recognised, as applicable to contracts of marriage. But when the legislature clearly, and unequivocally express their will, it is not for this court to refuse to carry it into effect, because inconveniences may result from so doing. Considerations, such as these, we presume, were in the contemplation of the law-maker, estimated by him, and found not to be of sufficient weight to counterbalance the benefits that were otherwise to be derived from the enactment. Arguments *ab inconvenienti* are well worthy of attention, where the law is doubtful; when it is plain and explicit, our duty is confined to obey what is written, and to enforce it. In the case of *Cassou vs. Blanque*, suit had been brought and was pending, when the act was passed.

The renunciation of the wife before the notary, of all her claims on this property, appears to the court, to be binding on her. It follows almost literally the words of 58th law

of the 18th title, of the 3d Partida. And the officer, who executed the sale, was cautious in stating to her what right she abandoned.—  
*Febrero de Escribanos, cap. 4, sec. 4, n. 121.*

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The oath, which the counsel contends, should have been added to it, is not required by this law, nor by any other, that our researches have furnished us with. *Febrero, part. 2, lib. 1, cap. 3, sec. 1, n. 46.* It was probably introduced into the Spanish jurisprudence from the canon law. It may have been found useful in deterring married women from violating agreements; but it is not seen how it could have given the contract a greater validity. We have no wish to multiply oaths in the transactions of society. The author just quoted says, though the wife may have sworn once she would not alienate her property, yet the second oath, when she does alienate, shall be binding.

In regard to the attachments levied on these notes, they of course must be released, before the defendants can be compelled to give them up.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

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be annulled, avoided and reversed, and proceeding to give such judgment, as in our opinion ought to have been given; it is further adjudged and decreed, that the defendants deliver over to the plaintiff, the notes of S. Packwood, endorsed by Greenbury Dorsey, to the amount of 28,633 dollars 33 cents, as specified in the petition, as soon as the attachments on the same, in the hands of said defendants, at the suit of *Samuel Ruggles vs. John Lafarge*, and *William D. Patterson vs. John Lafarge* shall be dismissed: and that they pay the costs of this suit.

It is further ordered, that nothing contained in this decree, shall affect, or impair any right which the plaintiff may have to demand damages of S. Packwood, if any be due, for having prohibited the delivery of the notes deposited in the defendants' hands.

PREVAL vs. MOULON.

APPEAL from the court of the first district.

A syndic cannot sue his co-syndic for funds of the estate, in the hands of the latter.

MATHEWS, J. delivered the opinion of the court. On the first argument of this case, the court having entertained, and expressed

doubts of the propriety and legality of an action, brought by a syndic of an insolvent, directly against his co-syndic, to recover the funds of the estate, which might be in the possession of the latter, the cause was reserved for further argument on this point.

It is admitted by the counsel for the plaintiff and appellant, that he has not been able to discover any positive rule of law on the subject. His arguments are founded on the inconvenience which would occur, in the administration of justice, from a doctrine contrary to that which he advocates; and an attempt is made to support them by analogy, to the situation of attornies in fact, in cases where a joint power is given to two or more, and to that of co-tutors, and co-executors, who are bound *in solido*, for the faithful discharge of the duties appertaining to their respective agencies. Of these analogies presented for our consideration, the most obvious is that of joint mandatories, or attornies.—Indeed, the difference of situation between such persons, as derive their authority to act for another, by a power immediately emanating from their constituent, and that of syndics, appointed by the creditors of an insol-

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vent, to manage his estate, is scarcely discernible; except the commissions allowed to the latter, and their interest in the estate, of which they have the administration; being usually chosen from amongst the creditors.—When two or more persons are appointed to act for another, the concurrence of all is, perhaps, necessary to bind their constituent; unless the mandate constitutes them *in solidum*, but it is clear, that when they are not constituted in this manner, each is bound for his own administration, and for no more. *Curia Philipica, lib. 1, cap. 4, n. 37.*

We are unable to discover any thing in our laws on the subject of syndics, which makes them accountable *in solidum*, for the management of the insolvent's estate.—Their power (when more than one is appointed) is joint; their rights are equal, and the funds which arise from the sales of the property entrusted to their administration, may be held by one, or by all, according to their own private regulations; but no one of them is more entitled to receive, and keep the proceeds of the estate, than another. It is unnecessary to decide the question whether a syndic can legally become the purchaser of

any part of the estate, submitted to his control, with power to sell. But admitting that he can lawfully buy, the price, which is thus virtually in his possession, for the benefit of all the creditors, according to their privileges, may be retained by him, in opposition to any claim of his co-syndics : for *in pari casu potior est conditio possidentis*.

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The acts of the legislature of 1817 have been cited to shew the duty of syndics. The same law, which points out their duties, gives a remedy against them for neglect or misconduct in the administration of an estate ; but the remedy accorded, is entirely different from that which is sought in the present case. It belongs to the creditors to obtain it, not to any one of the syndics, by suit against his co-syndic.

It is the opinion of the court, that the plaintiff (although, perhaps actuated by the best motives) did mistake his authority in commencing this action ; and as the toleration of suits by one syndic against another, who is equally empowered to manage the estate of an insolvent, might lead to results worse than absurd ; and as the respective rights of the creditors in this case may be settled, either

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by adjudgment for the final distribution of such estate, or by their proceeding in pursuance of the provisions of the act of 1817,

It is therefore ordered, adjudged and decreed, that the judgment of the district court be reversed and annulled, and that judgment be here entered for the defendant, as in case of non-suit.

Moreau for the plaintiff, *Cuvillier* for the defendant.

MONTILLET vs. DUNCAN.

APPEAL from the court of the first district.

Strict proof is required of the authority given to a third person to receive notice, in behalf of an endorser.

PORTER, J. delivered the opinion of the court. The only question which this case presents, is the effect of notice of protest to the agent of the defendant.

The power produced does not confer, on the attorney in fact, authority to receive notices. It is true he was in the habit of doing so, and communicating them to his principal. But whether the latter considered these notices good, because they were always handed to him, or because he admitted the agent was appointed to receive them, is not clearly es-

established by the testimony. When a case is attempted to be taken out of the general rule, on this subject, a strict observance of which is so important to the commercial world, the testimony should leave no doubt of the fact on which the exception is claimed. Here, however, in addition to the obscurity in which the proof leaves the authority of the attorney in fact, it is shewn that about the middle of November, more than a month before the date of the protest, the defendant had returned to town, and reassumed the management of his own affairs.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Morse for the plaintiff, *Livingston* for the defendant.

THE STATE vs. JUDGE PITOT.

APPLICATION for a *mandamus*.

PORTER, J. delivered the opinion of the court.
By an act passed the 3d March, 1819, entitled an act respecting landlords and tenants, a

When an act of assembly directs that the judgment of a justice of the peace shall be executed notwithstanding an appeal, it cannot be suspended by an injunction.

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a justice of the peace, to enable the former to be put in possession of the demised premises. And the 2d section declares that an appeal from the judgment thus rendered shall not suspend its execution.

D. Seghers had judgment rendered against him under this act, by Gallien Preval, a justice of the peace, in this city. In order to stay execution, he applied to the parish judge for an injunction, which was granted. On application made by the opposite party, it was dissolved. From this decree an appeal was prayed, which being refused, the plaintiff has taken a rule on the judge to shew cause why he did not grant it.

We have the return before us which that magistrate has made, and he states, among other things, that the injunction was erroneously prayed for, and accorded; because, by special law, the execution of the judgment before the justice of the peace could not be suspended.

The parish judge acted correctly in refusing the appeal; for, as the law already cited, has directed, that in every case of this kind the judgment of the justice must be executed,

and shall not be suspended by an appeal: it cannot be indirectly suspended by an injunction. This decision must not be understood to deprive the citizen of the protection of the court, in any case where an interlocutory judgment works a grievance irreparable; nor is it contemplated to lay down a rule that the facts can be taken from the judge's return, so as to conclude the rights of the party complaining; but here it has been admitted, that the judgment enjoined was under an act of the legislature, which prohibits any other court from interfering with the execution of that judgment.

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It is therefore ordered, adjudged and decreed, that the rule be discharged, with costs.

Seghers for the state, *Denis* for the defendant.

PENRICE vs. CROTHWAITE & AL.

APPEAL from the court of the parish and city of New-Orleans.

M-Caleb, for the plaintiff. This cause comes up upon two bills of exceptions, taken by the

An order of bail will not be granted, on an affidavit, that the sum claimed is due to the affiant, as he believes.

When the

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creditor makes
the oath, it
should be positive.

The refusal to
receive a supplemental petition, is not a ground of appeal.

A suitor, who
appeals from a
part, cannot
urge any other.

appellant, to the opinion of the judge below; in discharging the bail upon the alleged insufficiency of the plaintiff's affidavit; and in refusing to the plaintiff permission to file a supplemental petition.

Our law, on the subject of bail, is evidently derived from the English practice. The formalities and requisites for holding to bail, are specially pointed out by statutes, both in England and this state. In England it is necessary in an affidavit to hold to bail, to set forth the cause of action, and the residence of the affiant. 1 *Tidd*, 154. And that the sum is £10, and upwards, &c. And, 12 *Geo. I, c. 29*, from the numerous decisions of the courts of Westminster-Hall, guided by the refined technicality of special pleading, the requisites under the English practice have been greatly increased, and it is now necessary to be particularly minute and careful in drawing up an affidavit, to hold to special bail. This refinement and technicality, under our liberal system of jurisprudence, has not as yet, and never will, it is hoped, be recognised by our laws, or insidiously introduced by our judges, whose great duty it is to look to the respective

rights of the parties litigant, founded as they may be, upon law and equity, and not to the manner and form in which they shall come.


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The language of our statute is plain and simple. 1 *Martin's Digest*, 482. The plaintiff, in his petition, states the cause of his action to be "for money had and received;"—the amount "four hundred dollars." So there can be no difficulty in saying that the sum was ascertained and specific; the language of the affidavit is positive, as to the amount really due, to the amount of money really had and received. The qualified part of the affidavit (as he believes) plainly has reference to the antecedent words—justly indebted to him. Knowledge derived from moral certainty must include a belief; for we cannot be impressed with conviction of the truth of a thing without believing it; when, therefore, I say, in emphatic words, I know its truth; I but express that belief, which is founded on moral certainty. This is the character of that belief, with which the plaintiff, in this cause, was impressed at the time he made the affidavit annexed to his petition; he had no doubt that the defendants had received the money; he had no doubt that they had received four


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hundred dollars; he had no doubt, from a combination of facts, which had come to his knowlege, subsequent to the payment of the money to the defendants, by the agents of him, the plaintiff, that they (the defendants) had received the money wrongfully; that they had practiced upon him fraud and deception; that property, which they had sold him, was property in which they had no title; so in justice and in equity, he was morally certain, he was under a sincere conviction (for which he appealed to heaven) that the defendants were indebted to him; supported too, by these great and immutable principles, that no man shall receive something for nothing; and that he, who wrongfully receives my money, shall be bound to restore it to me. Our statutes permit the agent or attorney in fact, to make affidavits to hold to bail—their information must be of a derivative character, as communicated from the principal, and creates that kind of belief, as defined by Doctor Johnson, and which is quoted by the counsel of the appellees. If the law is then formed for the protection of the rights and interests of the creditor, giving him a pledge that the debtor shall be forthcoming to answer his de-

mand; if however, in giving this pledge or security to the plaintiff in action, it should previously require certain formalities, would it not be woefully inconsistent that more should be required in the one case than in the other? That it should be said, you shall require security from your debtor, upon making affidavit to certain things: if you swear yourself, be sure you swear positively; if you employ an agent, why, he may swear as loosely as he pleases. That the statute of Louisiana, for holding to bail, declares that the citizen shall be deprived of his liberty. No, rather say, that the treacherous scoundrel shall be obliged to give security, upon the unqualified positive oath of the man who swears for himself, but only requires the simple belief of his friend or agent. All that the law requires, is a reasonable ground, upon which to draw the inference of an existing debt, and it will accord its remedy. The consequence of such a technical nicety will leave the door for perjury open; and such a construction of the law, will force the creditor to secure his debt, to swear in positive language; let his honest conviction and belief be what it may. And in

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the language of Lord Mansfield, it would be using conscience, contrary to all conscience.

The application for the discharge was also too late, for the defendants had plead in abatement, and also the general issue. 1 *Tidd*, 164.


The counsel for the appellees seems to think that we have not a right now to go into the question embraced in the second bill of exceptions, because no exception was taken to the judge's opinion on that point. If such be the fact, then we are too bold to call it a bill of exceptions. Upon reference, however, to the record, it will be found (we believe) that we did take an exception to the judge's opinion. It will not be a sufficient ground to remand the cause, because we did not particularly state all the grounds of appeal.— If there appear sufficient upon the face of the record, to enable this court to decide, it will not send the cause back.

The defendants could derive no possible advantage from such a course, the costs would be increased, and delay occasioned.

The question certainly does not now come up for review, whether the original petition, filed by the plaintiff below, shews any cause

of action whatever. The defendants' counsel never attempted to dismiss us from court upon that ground. When the subject comes before the court (if it ever should) we will then endeavor to shew, that the original petition did contain a sufficient cause of action. The question now for the consideration of the court is, whether or not we should have been permitted to amend, by filing the supplemental petition, as exhibited upon the record. The object, as the court will perceive, was to detail more minutely the circumstances of time and place, and the manner in which the plaintiff's money had come into the possession of the defendants. To these amendments the defendants' counsel had no objection, but contended, a new cause of action was embraced in the supplemental petition. The judge below sustained the objection, and we are now compelled to come to the supreme court to accord to us the privilege under our liberal system of pleading, of amending our petition, by filing the supplement offered to the parish judge. The authority cited, we believe, will support us in the application. 1 *Martin*, 175. 2 *id.* 297. 2 *id.* 102. 3 *id.* 398.

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*Watts*, for the defendants. Swearing to belief is not a sufficient affidavit on which to hold a defendant to bail.

1 *Tidd*, 155. In point of form the affidavit should be direct and positive—that plaintiff has a subsisting cause of action—as the party making it *believes*, will not in general be sufficient.

Our statute is much more strict. 1 *Martin's Digest*, 482. sec. 10. Title Arrest—"In all actions," &c. the plaintiff, in action, on making affidavit of the amount really due of his debt or demand, &c.

He must swear to the amount, and that it is really due. Belief, says Johnson, is "credit given to something which we know not of ourselves, on account of the authority by which it is delivered."

The statute requires plaintiff should know it of himself. The plaintiff sues neither as curator, assignee, nor makes the affidavit as agent, in which cases he might be supposed not to know personally the amount, or whether it was really due. His petition states the transaction to have been between himself and the defendants. He ought, therefore, to have sworn to it directly and positively, as a thing

of his own knowlege. If he could not do so, it is not a case in which the law permits the party to be held to bail.

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The appellant has no right to go into the question, whether the judge properly or improperly rejected his amendment or supplemental petition. He took no exception to the judge's opinion on that point. He has only alleged the discharge from bail as error in his petition of appeal. He cannot, therefore, now bring that point up for review.

If it is permitted to be brought up, it is to be observed :—

1st. That the original petition shews no cause of action whatever; for, to say that William paid James a sum of money, which James refuses to pay back to William, is no cause of action; for it is to be presumed William was indebted to James. Had the plaintiff alleged that he paid thro' fraud, duress, or mistake, he might have had grounds for a recovery; but as it stands on the declaration, there is no cause of action. If the amendment contains a cause of action, it is certainly a new one, as there is none in the original petition—but the rules of court do not permit a cause of action to be introduced in the shape of an amendment.

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More particularly in an action commenced with bail process. The court below was therefore right in refusing to permit the amendment. Had the plaintiff acquiesced in the decision discharging bail, he might then, with more propriety, have asked to amend—if this court confirm the decision of the court below as to bail, plaintiff might then apply to amend, and if a reasonable and proper amendment is refused, he has his redress. But all courts will be more strict in refusing amendments where a party is held to bail, than in a case where he is simply cited to appear.

PORTER, J. delivered the opinion of the court. The parish judge did not err when he decided that the affidavit to hold to bail in this cause was insufficient: swearing, that the defendant owes the affiant as he believes, is not that declaration which the law requires. It should be positive, when the creditor makes the oath.

We cannot go into the opinion of the court, on the refusal to receive a supplemental petition. It does not produce a grievance irreparable in this case, and, therefore, is not a decision from which an appeal lies, *ante*, 275.

If it was, the plaintiff could not have it examined now; for, by his petition, it appears he has appealed alone from the judgment discharging the defendant out of custody.

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It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

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FLOGNY vs. ADAMS.

APPEAL from the court of the fourth district.

PORTER, J. delivered the opinion of the court. The plaintiff and appellant claimed in his petition, the sum of 364 dollars, by reason of a promissory note made to him by the defendant.

If a claim be made in one capacity, and proven to be due in another, the court will give judgment on the merits, if the adverse party makes no objection.

On the trial he produced a note payable to Pierre Flonion, for the amount mentioned. This note was not annexed to the petition, or made part of it by reference. The defendant objected, that it did not correspond with the allegation of the plaintiff, and the court being of that opinion, there was judgment of non-suit, from which this appeal has been taken.

We think the court below did not err—the

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note produced, on the face of it contained a promise to an individual, by a different name than the plaintiff; if it was intended to establish by evidence, *dehors* the instrument, that they were the same persons; the petition ought to have stated the note in the words it was made, and averred the identity. The defendant would then have been informed of the nature of the demand made on him, and have been enabled to come forward with proof, if he had any, to resist it.

We have held in the cases of *Canfield vs. McLaughlin*, 9 *Martin*, 303, *Bryan and wife vs. Moore's heirs*, 11 *ibid.* 26, and in *Larche vs. Jackson*, *ibid.* 284; that where the parties alleged rights in one capacity, and proved them in another, without objection in the inferior court, we would proceed to give judgment on the merits. These cases were decided in pursuance of a provision in the *Novissima Recopilacion*, 11, 16, 2; and upon the consideration that the principle of law which requires proof, and allegation to correspond, was made for the protection of the adversary, who might waive it if he chose.

Should, however, the objection be made when the testimony is offered, the law which

authorised these decisions, does not apply; and the equity on which they were founded vanishes. Another rule governs them; that which requires that there be no variance between the evidence and the demand. *Febrero*, lib. 3, cap. 1, sec. 7, n. 283, 8 *Martin*, 400.

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vs.
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It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Preston for the plaintiff, *Morse* for the defendant.

HARROD & AL. vs. PAXTON.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The plaintiffs are holders of the bill of exchange, on which this suit is brought by endorsement from "G. M. Ogden, acting executor of P. Norris," to whom, and Rowland Craig, also executor of Norris, it had been transferred by the defendant.

The intervening party alleges, that Ogden endorsed the bill after his authority, as executor, had expired; that the indorsees had

Whether the word *executor*, in an endorsement is to be considered a one of description, or as indicating that the endorsement is made in right of the testator?

In remanding a case, when it does not clearly appear which of the claimants has a right to the money recovered, the supreme court will decree it to be paid into court.

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knowledge of the fact—that the legal right to it is vested in the heirs of Norris, and that they (the interpleaders) have been recognised as such, by a decree of the court of probates.

There was judgment of non-suit in the court below—both plaintiff and heirs of Norris have appealed.

It is unnecessary to give any opinion whether the word executor, in the endorsement of this bill, must not be considered as one of description alone, or as indicating that the endorser acted in right of his testator; in either point of view, the plaintiffs could not succeed in shewing a right to the bill—in the first, because it wants the name of Craig; and in the second, because the transfer was made after the authority of the executor had expired. We think that judgment must be given in favor of the heirs of Norris, in whom the legal title is vested.

But the plaintiffs aver, that this bill belongs to a commercial concern, in which they were connected with the late P. Norris: that his estate owes them, and that they have a right to have the proceeds of this judgment. This is denied by the heirs, and there is no

evidence on record to enable us to decide between them. The money therefore must be paid into court, subject to the decree which may be given on the issue thus joined between the parties.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the heirs of Norris, who have intervened, do recover of the defendant, the sum of three thousand dollars, with interest, from judicial demand and costs of suit; and it is further ordered, that this cause be remanded to the district court for proceedings on the issue, joined between the plaintiffs and the intervening party in this suit, and that until the same be decided, the money made on this judgment, shall be paid by the sheriff into the hands of the clerk of the district court, subject to a final judgment in the premises; and it is also ordered, that the appellee pay the costs of the proceedings heretofore had in the court below, and the costs of this appeal.

Grymes for the plaintiffs, *Seghers* for the intervening party, *Conrad* for the defendant.

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GIROD vs. PERRONEAU'S HEIRS.


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HEIRS.

APPEAL from the court of the first district.

If the judge cannot certify the record in positive terms, the appeal will be dismissed.

PORTER, J. delivered the opinion of the court. We remanded this cause a second time, on a suggestion that the judge might be able to amend his certificate; it now comes up with a declaration, that owing to the length of time that has intervened since the rendition of judgment, he cannot certify more positively than he has already done.

Having exhausted all the means given by law, to get the merits of the case before us, and failed, nothing remains for us to do but dismiss the appeal with costs.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs. *Ante*, 1, 224.

Cuvillier for the plaintiff, *Porter* for the defendants.

DE ARMAS & WIFE vs. HAMPTON.

Property acquired by wife, for a valuable consideration, during marriage, may be sold by husband and wife.

Marriage con-

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court.

This case was before us in May, 1819, and July, 1820. 6 *Martin*, 567, 8 *Id.* 432. Since

that, the pleadings have been amended, new evidence introduced, and the same judgment having been given in the district court, the defendant has again appealed.

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The new evidence does not appear to put the case in a very different point of view.

tract not record-
ed in pursuance
of the act of
1813, has no ef-
fect against
third parties.

The statement of facts now shews that the premises sold by the plaintiffs to the defendant, and the price of which they now claim, were purchased by Mrs. De Armas' first husband (J. W. Scott) before their marriage, and on his death, descended to their two sons.

That since her late marriage, the youngest of these sons died, and she inherited thereby one half of the premises; the other half of which has since been adjudged to her, at the price of the valuation.

This last half, being an acquisition for a valuable consideration, was the proper subject of a sale by the plaintiffs. But the defendant contends, that the district court improperly declined to consider the other half, which Mrs. De Armas obtained by inheritance, on the death of her younger son, as dotal, under the marriage contract—in this the opinion of the court is with him.

It is urged that the defendant has nothing

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to fear from the claim of Mrs. De Armas, under her marriage contract, in which all the real estate which might accrue to her by inheritance, during her marriage, was declared to be dotal, as this marriage contract was not recorded according to the provisions of the act of 1813. 1 *Martin's Digest*, 702. This circumstance, which was not noticed at the first hearing of this cause, in 1819, is now pressed on us. We lately considered the effect of it in the case of *Lafarge vs. Morgan & al.* and are of opinion that the neglect of recording the contract, prevents its effect against a third party.

It is not urged that the defendant had, at the time of the purchase, any knowledge that a part of the premises was dotal: this renders it useless to inquire whether a purchaser, with notice, may avail himself of the neglect to record. The circumstance of notice having reached him, after the price became payable, cannot affect a right fairly acquired.

For these reasons, it is ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.*

De Armas for the plaintiffs, *Preston* for the defendant.

PORTER, J. did not join in this opinion, having been of counsel in the cause.

CROGHAN vs. CONRAD.

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CROGHAN

vs.

CONRAD.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court.

The defendant, being sued on a promissory note, pleaded the general issue, and that the plaintiff cannot maintain his present action.

A note, the payments of which is secured by a special mortgage, may be sued on, in the ordinary way.

The district court gave judgment for the defendant; the evidence shewing that she had given a special mortgage to secure the payment of the note. The plaintiff appealed.

The appellee relies on *Pothier des Hypotheses*, n. 155, where it is said that the creditor who has a notarial act, an executory title, *un titre exécutoire*, must resort to it, and cannot sue in the ordinary way, *par la voie de la demande*.

This writer cites no authority, and *Bernadi*, in his edition of Pothier's works, observes that this opinion appears to him a hazardous one.

In the present case, the defendant made a promissory note; the circumstance of her securing payment by a special mortgage, strengthens, does not weaken, the note; nor does it render it an authentic title.

In giving afterwards a mortgage, she entered into an accessory contract—one which fortifies, but does not mar the principal.

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Proceedings by the *via executoria* are considered by *Febrero*, and the author of the *Curia Philipica*, as introduced for the benefit of the creditor—they consider the *via executiva*, and *via ordinaria*, as different, but not contrary means, given by law to the creditor, and they both think that even after resorting to the one, he may pursue the other, and afterwards return to the former.

Si el acreedor intenta primero la via executiva; y luego pasa á la ordinaria, podrá dexar ésta y continuar aquella, pagando al deudor las costas causadas hasta allí en la ordinaria: la razon es, porque aunque estas dos vias son diversas, no son contrarias. A mas de que la execucion esta introducida en su favor. 3 Febrero, 2, sec. 2, n. 115, Curia Philipica, executoria, n. 1, sec. 2.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and this court proceeding to give such a judgment as in their opinion ought to have been given in the court *a quo*, it is ordered, adjudged and decreed, that the plaintiff recover from the defendant, the sum of twelve hundred and twenty-five dollars, with interest (as is ex-

pressed in the note) at the rate of ten per cent. East'n District.
from the 5th of May, 1821, till paid, with costs May, 1822.
in both courts.

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vs.
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Hennen for the plaintiff, *Denis* for the defendant.

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DAUNOY vs. CLYMA & AL.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court.
On the trial of this cause the plaintiff offered to introduce witnesses to prove that his ancestor was insane at the time of executing the deed of sale, under which the defendants, Johnson & Bradish claim; and that the insanity was notorious.

Proof cannot be received of the insanity of a vendor, whose interdiction was not provoked.

Nothing can be assigned as error appearing on the face of the record, but matter of law, which (without the adversary's consent) could not have been cured by other proceedings in the cause.

As no sentence of interdiction had been provoked, in the life time of the vendor, we are of opinion the judge did not err in rejecting the evidence offered. *Civil Code*, art. 16, 80. In *Marie vs. Avart's heirs*, 10 *Martin*, 27, this provision was held not to apply to donations, *mortis causa*, or rather to be controlled by another article of the same work, in relation to acts of that description. The applicability

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of the law, however, to contracts such as that before the court, was, however, not doubted in that case, nor is it doubted now.

The other matters alleged as a ground of reversal, cannot be examined. Nothing can be assigned as error appearing on the face of the record, but matters of law, which (without the adversary's consent) could not have been cured by other proceedings in the cause.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Cuvillier for the plaintiff, *Grymes* for the defendants.

WALSH vs. COLLINS.

Costs are incidental, and necessary to a judgment, and the jury cannot allow them to a defendant against whom a recovery is had.

The party, from whom land is recovered, ought to be charged for the use and occupation, from the day of the legal demand.

APPEAL from the court of the third district.

This suit was instituted to recover a tract of land, in the possession of the defendant, and \$40 for the use and occupation.

The defendant pleaded the general issue, title in himself, and prescription.

There was a verdict and judgment in favor

of the plaintiff, for one half of the land; but he was condemned to pay costs. He appealed.

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Watts, for the plaintiff. 1st. The verdict is contrary to evidence—the defendant's acquiescence in plaintiff's title being fully proved, so as to destroy defendant's equitable title.

2d. It is contrary to law in ordering plaintiff to pay costs.

3d. The verdict is defective in not adjudicating on the rent claimed by plaintiff.

I. It is evident from the probate sale of Adams' estate, that the whole tract was intended to be, and was sold. The description in the process verbal of that sale includes the whole. The testimony of Wheeler proves, that in the lifetime of Adams, and when Adams contracted to sell Wheeler this very land, the defendant acknowledged the right in the whole land to have passed to Adams, under the sheriff's sale. The defendant agreed to pay Wheeler \$50 rent per annum, for the land, and did pay part of that rent according to Wheeler's testimony.

Creswell's testimony is, that defendant pro-

East'n District. mised to pay plaintiff \$40 per ann. rent, for
May, 1822. the land, and this after the probate sale.

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COLLINS.

Austin's testimony is clear and positive, that on returning from the probate sale, the defendant admitted that he had no ownership in the land—that he expected plaintiff would let him have, in other words, sell him half the land.

Austin heard nothing of the claim at the sale, and he is a brother-in-law of the defendant. Defendant did not state his claim in his conversation with Austin, but acquiesced in the sale of the whole to the plaintiff. Austin states it as the general impression, that if defendant had bid for the land, plaintiff would not have bid against him; much less would plaintiff have bid at all, if he had heard of any claim of defendant's to the land.

It has been decided in equity, although I cannot lay my finger on the decision at present, that a party who, with his eyes open, stands by and permits his property to be sold, without claim or opposition, is accessory to the fraud, error or deception; is consenting to the sale, and never afterwards can impeach it; and surely no principle is more equitable. This land originally sold, at a long credit, for

\$600—when worn out, is sold at sheriff's sale East'n District.
 to Adams for \$300—contracted to be sold by May, 1822.
 Adams to Wheeler for \$350. Is it to be be-
 lieved that Walsh would give \$400 for half of
 it, or for a disputed title to the whole? The
 defendant consented to become tenant to
 Wheeler, and pays him rent—acquiesced in
 the sale made by the probate court to the
 plaintiff, and attorns to him as his landlord, by
 agreeing to pay him rent. The conclusion is,
 that defendant had either sold his right to his
 father, Robert Collins, against whom the exe-
 cution sale was originally, or permitted the
 whole to be sold to pay his father's debt. At
 all events, his silence and acquiescence was
 such as to estop him from claiming any part
 of the land, and to extinguish his title to all of
 it. The jury ought, on the evidence, to have
 found a verdict for the plaintiff for the whole,
 and what they ought to have done, this court
 will do.

II. That part of the verdict which sentences plaintiff to pay costs, is clearly illegal.

Plaintiff demands a piece of land by description. Defendant denies his right to all of it. If, therefore, plaintiff recovers any part of the land, he is entitled to costs.

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The verdict gives him one half of the land, therefore he is entitled to costs.

If defendant wanted to avoid this, he ought to have plead specially, admitted plaintiff's right to one half of the land, and expressed himself ready to make a partition; or if an amicable demand was made, on that demand he ought to have expressed his willingness to divide, or if no demand was made, he might have pleaded as above, and the amicable demand not being proved, he would have recovered costs.

In dower, at common law, if the defendant pleads *tous temps prist*, viz. ready to assign dower, the plaintiff recovers no costs, and defendant pays none, so here defendant might have admitted plaintiff's right to half the land, and plead "ready to divide," and costs could not equitably or legally have been awarded against him. *Humphrey vs. Phinney*, 2 *Johnson*, 484.

In suits in chancery for land, if the complainant recovers part of the land in controversy, he should, in general, recover full costs. *Hardin's Rep.* 1.

If a plaintiff sues for \$5000, and a jury were to bring a verdict for plaintiff for \$3,000, and add to it that defendant did not owe plaintiff

the other \$2,000, would not the latter part of it be surplusage, and would not plaintiff be entitled to costs, and can the jury give them from him?

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COLLINS.

So here the verdict of the jury is exclusively for the plaintiff—the latter half is surplusage, and merely nugatory. “We, the jury, find for the plaintiff, one half of the land in question, and for the defendant the other:” would not the title to the whole of the land have been equally *res judicata*, if the latter member of this verdict had never existed.

The rights of plaintiff and defendant would have been the same as they are now, if the jury had found simply a verdict for the plaintiff for an undivided half of the land. In *Bolton & al. vs. Harrod & al.* 10 *Martin* 115, and *Nugent vs. Delhomme*, 2 *Martin*, 307, the court say, costs are incident to the judgment; of course they go to the party who gains the judgment, and who is that? Surely, the plaintiff; for he gains by it one half of that land of which the defendant denied him any part. The defendant gains nothing by the verdict—by it he loses half of what he claimed, and was in possession of. A jury have no right nor power to give costs—they are a part of the judgment of the court on the verdict. If the court af-

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firm this part of the verdict and judgment, they will decide contrary to the above decision, for they will give costs to a party in whose favor no judgment was rendered.

III. The plaintiff claims rent for the land—\$40 per ann. for the whole, having supposed himself owner of the whole. The verdict finds that plaintiff is owner of one half.

Plaintiff is, therefore, entitled at least to \$20 per ann. for his half. It appears in evidence that defendant had agreed to give \$50 per annum to Wheeler for the land; and also from Creswell's testimony, that \$40 per ann. was a fair rent for the place.

Plaintiff became owner in January, 1817—he is, therefore, entitled to rent up to April, 1820, viz: 3-3 c. \$20 per annum, is \$65. The jury were bound to give a verdict for the rent, as it was demanded in the petition. If the court will not take upon themselves to say what the rent ought to be, they must send the cause back to have it ascertained by a jury. The court may decide on the amount of the rent. Had the jury given too much or too little, this court could have corrected their verdict, and the facts being all before the court, it can decide and draw the proper con-

clusion, and give a final judgment. It was done East'n District.
so in *Poeyfarre vs. Delor*, 7 *Martin*, 3. May, 1822.

I apprehend that I have made it clearly appear to the court that the defendant, by his acquiescence, his conduct and actions, has recognised the plaintiff's title, and is estopped from disputing it; and the verdict is contrary to evidence, in finding only half the land for the plaintiff; and that on the evidence, plaintiff is entitled to a judgment for the whole.

That on the second point, so much of the verdict as goes to make plaintiff pay costs, is illegal, and that the verdict ought to have given plaintiff costs against the defendant, inasmuch as the judgment is for the plaintiff.

And that on the third point, the cause must be sent back for the jury to find a verdict as to the rent, or the court may decide on the evidence before them.

Lobdel, for the defendant. The plaintiff has no right to a new trial, or a decree of this court in his favor. 1st. Because, from the testimony, the defendant is the owner of the two hundred acres of land, by an equitable title. 2d. Because, the defendant has acquired a legal title, by prescription. 3d. Be-

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cause, the lessor of the plaintiff, never had a right in more than one hundred acres of the land. 4th. Because the confessions or laches of the defendant, if any, did not take away from him a vested right.

I. The agreement entered into by Thomas Pollock, Robert Collins and Jacob Collins, states that Thomas Pollock is to give Robert Collins and Jacob Collins a *bona fide* deed for the two hundred acres of land, on the condition of the Collins' paying to him, in two payments, the sum of six hundred dollars, which was to be the full consideration therefor. 2d. The deposition of Mrs. Jane Percy, states, that she knows an agreement was made with Thomas Pollock, by Robert Collins, and Jacob Collins, for the two hundred acres of land, for which they were to pay Pollock, in the years 1809 and 1810. That captain Percy made the payment for Jacob Collins, to Pollock; that Robert Collins failed in making his payment, and that in consequence of such failure, Jacob Collins paid the residue, at the request of Robert Collins and Thomas Pollock; and that Robert Collins gave up his right to the agreement; and also agreed that Jacob Collins, should receive the

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deed in his own name, and for his own benefit; in consequence of such payment, that Jacob Collins, the appellee, then lived on the land, and now lives on it. There is no testimony on the record, which contradicts the agreement, or the deposition of Mrs. Jane Percy. But the appellant's counsel excepted to their being received as evidence. The agreement being the evidence of the original equitable title from Thomas Pollock, from whom both the appellant and the appellee claim the land, was correctly received by the judge, to shew what interest they possessed, having the highest evidence the nature of the case would admit.

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The deposition of Mrs. Percy, was taken by consent, and all waiver of objection to the time, place, and manner; and as the appellant's counsel saw the interrogatories, and consented to propounding them, every direct answer to them, and the deposition itself, without any alteration, must be received; her personal appearance was expressly dispensed with—consent cures defect.

Although the sheriff's deed, and the extract of the process verbal, each express the conveyance of the two hundred acres of land, yet they derive their efficacy, if any, from

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Robert Collins, who, it seems, from the testimony, parted with all the interest he possessed in the original agreement, on failure of his covenants, to Jacob Collins, the appellee.— On an examination of the testimony, which has any bearing on this point, it clearly appears that the appellee has acquired an equitable title to all the land, by the subsequent parol agreement of all the parties.

Parol evidence may be given to extend a written contract. 2 *Day's Cases*, 137, 3 *Johns. Rep.* 528.

Where a written agreement has been varied by parol, and there has been such a part performance of the parol variation, as would have procured it to be specifically executed, provided it had formed a part of the original agreement, the party will be admitted to give evidence of such subsequent unwritten variation. *Philip's Evidence*, 457.

It is a settled rule, that if a party sets up part performance, to take a parol agreement out of the statute of frauds, he must shew acts, unequivocally referring to, and resulting from that agreement, such as a party would not have done, unless on account of that very agreement, and with a direct view to its per-

formance, and the agreement set up must appear to be the same, with the one partly performed—there must be no equivocation or uncertainty in the case. 1 *Johns. Ch. Rep.* 131, 149 and 274, 15 *Mass. Rep.* 85, 3 *Martin's Rep.* 486. A debtor can no longer claim the benefit of the term of time, after he has failed in the performance; *Code*, 276, art. 88. An obligation *in solido* is not presumed, it must be expressly stipulated. *Civil Code*, 278, art. 102.

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II. It appears from the deposition of Mrs. Percy, and other witnesses, that the appellee lived on the land previous to the contract or agreement, and has resided there ever since, even to this day. The first purchase was made in September, 1808, and the appellee has resided before that time, under the vendor, as tenant, and since that period, under a supposed good title, from Thomas Pollock, his vendor, making a period of rising ten years; although the vendor had not granted a deed of sale, yet he had promised to do so, on the fulfilment of the conditions—by this act the appellee acquired an equitable title to the land in question, and living on the land under

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such title, for the period of ten years, clearly gives him a legal prescriptive title to it.

The doctrine of prescription is laid down in the *Civil Code*, 478, art. 67.

III. The agreement, and the testimony of Mrs. Percy, and some others, shew, that Robert Collins had originally an equal interest in one half of the land, with Jacob Collins, the appellee, which was subject to the performance of a certain condition, each being bound for the performance of his half; the most favoured construction, therefore, of the testimony produced in the court below, cannot give Robert Collins an original interest in more than one hundred acres of the land; the same testimony shews that Robert Collins did not fulfil his condition, and that the same was paid by Jacob Collins, the appellee. If this payment by the appellee, gave him no greater interest in the land, than can be inferred from the original agreement, and Robert Collins, notwithstanding his parol agreement, was the legal owner of one hundred acres of the land, his representatives did not receive by their purchases at the sheriff and probate sales, a title to more than one hundred acres:

and therefore, these deeds conveyed a greater quantity of land than the lessor possessed.—

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If the representative of Robert Collins, the appellant in this suit, and the plaintiff in the court below, insist upon the original bargain being paramount, and to receive the interest of his lessor in this land, let him pay to Jacob Collins, the appellee, the consideration paid to Pollock, for his half of the land, and the expenses and improvements thereon, since the possession of it by the appellee, and he might then, with some semblance of justice, make a judicial demand of one hundred acres, and truly state he was the representative of Robert Collins in so much. If he wishes equity, let him do equity. A purchaser at sheriff's sale, gets no better title than the defendant had. 3 *Martin*, 622. A judicial sale does not transfer the property of a third person. 9 *Martin*, 489.

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The appellant will say he has a right to a reversal of the judgment of the court below, or to have the cause sent back to that court, in consequence of the jury awarding the costs against the appellant, where they found a verdict for him, for one hundred acres of the land; to this I answer, that the appellant set

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up a claim to the two hundred acres of land by virtue of his purchase, and the acknowledgment of the appellee, and actually made a judicial demand for the two hundred acres, in which he failed in substantiating; he consequently failed in his action, and was justly chargeable with costs. Again, this claim to the two hundred acres, if good, was an equitable one, arising from the acknowledgments of the appellee, or his laches, and costs in all equitable suits, may be awarded against either party, or both, at discretion. An obligation *in solido*, is not presumed, it must be expressly stipulated. *Civil Code*, 278, art. 102.

IV. All the testimony on the subject of confessions and laches, is the testimony of Criswell, Amos Nebb and Wheeler.

Criswell states, that the appellee acknowledged himself the tenant of the appellant, and that he was to pay the appellant forty dollars per annum for the rent; he also swears, that the appellee was present at the probate sale, and did not forbid the sale of the land. Nebb and Wheeler state that the appellee confessed he would as soon the appellant would buy the land, as any other person, and did pay one of them part rent.

In opposition to this testimony, is the testimony of John Stirling, Jesse Robertson, and others, who state that the appellee did forbid the sale of the land, by the probate, and that his work had gone to pay for it. He is also proved to be a very ignorant and illiterate man, easy to be imposed on.

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On a close examination of the testimony of Creswell, it will be perceived, that he is very reluctant to give evidence against the interest of the appellant, whose overseer the witness then was, and apparently was very anxious for the success of the appellant, as he is contradicted in one material point by others, and can give no satisfactory reason, for the extraordinary acknowledgments of the appellee—his testimony ought to be received with great caution—this contradiction and inconsistency will go far against the credit of the testimony, if not against the credibility.

The testimony of Amos Nebb was illegally received, and therefore, is no testimony, as he was objected to. He was the son-in-law of Elijah Adams, deceased, to whose succession the land was said to belong. He was the curator *ad bona*, and tutor to the minor children of Adams—he was entitled to an usufructuary

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interest in his wife's share of that succession, as one of the heirs of Adams, and therefore, had a direct interest in the proceeds of the land sold to appellant. *Civil Code*, 164. art. 36. *Id.* 204, art. 240. *Id.* 312, art. 248.

Testimony of confessions, at best, is a suspicious kind of evidence, and the civil, as well as the common law, view them with great jealousy.

The acknowledgments or confessions of a party, as title to real property, though they may be good to support tenantry, or to satisfy doubts in cases of possession, yet are not to be received against written evidence of title. 5 *Johns. Rep.* 19.

Declarations of a party to a sale or transfer, and which go to take away a valid right, are not admissible evidence. 5 *Johns. Rep.* 412.

An obligation without a cause, or with a false or unlawful cause, can have no effect. *Civil Code*, 264. art. 31.

There is no testimony of the laches of the appellee, as the only sale he is proved to be present, of this land, he expressly forbids, and asserts his title.

From the testimony received, I think there can be no doubt of the correctness of the ver-

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dict of the first jury—at all events, that the second jury gave the appellee no more than his just rights; and if there should be doubts of the appellee's title to the two hundred acres of land, there can be no grounds to disturb the verdict of the second jury, who were much better judges of the credibility of the testimony received from the witness, than this court can be.

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MATHEWS, J. delivered the opinion of the court. The appellant insists on a reversal of the judgment of the court *a quo*, on three grounds. 1. Because the verdict is contrary to evidence. 2. Contrary to law in ordering plaintiff to pay costs. 3. It is defective in not adjudicating on the rent claimed.

The evidence in the case, traces the title to the disputed premises, back to one Pollock, who transferred his right to R. & J. Collins; the quantity of land being 200 acres. The whole tract was sold by the sheriff of Feliciana, to satisfy a judgment against R. Collins alone; and under this last title, derived thro' one Adams, who was the purchaser at sheriff's sale, the plaintiff now claims. It is evident that the sale under execution, convey-

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ed no more than the title of R. Collins, which seems to have been to an undivided moiety of the whole tract of 200 acres, and to this alone the appellant has acquired a title; and was at the institution of this suit, a joint tenant, or tenant in common with the defendant; unless by some act or acquiescence on the part of the latter, he has obtained a title to the whole tract of land. It is not pretended that the appellee has done any act which amounts to a divestment of his right to one half of the property; but that according to principles of equity and natural justice, he has forfeited his right and title by remaining silent, and not giving notice to the plaintiff of his claim, at the time the latter purchased the whole tract, at a public sale, of the succession of Adams, who held by sheriff's deed, executed by virtue of a *fiery facias* against R. Collins alone, as already stated. What effect such conduct might have on a title to immovable property, according to our laws, it is useless, in the present case, to enquire; as from the testimony, the jury may well have negatived the fact of such having been the conduct of the defendant in this case.

The suit being for the whole tract of land,

and the plaintiff having recovered one half, full costs ought to have been adjudged to him, unless the defendant had in his answer shewn a willingness to have the property divided, and partake in the manner provided for by law, in cases of tenancy in common. This he has not done, but denies all right in the plaintiff. Decreeing costs, in the administration of justice, does not appertain to the province of jurors; they are incidental and accessory to the judgment of the court, fixed and ascertained by law, and ought generally to be adjudged in favor of suitors who are successful in their claims. We are, therefore, of opinion, that the verdict and judgment of the court below, are erroneous in adjudging costs to the defendant.

As to the rent claimed, it is shewn by testimony not contradicted, that the defendant agreed to pay forty dollars for one year's use of the whole plantation, if he should be obliged to pay rent. But according to the verdict and judgment of the court below, the plaintiff is a rightful proprietor of only one half. The rent ought, therefore, be reduced in proportion to his interest in the property, which will fix it at twenty dollars per annum.

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A question then arises as to the time for which rent ought to be paid. In the petition forty dollars are claimed for one year, and also an indefinite sum as compensation for the use of the land. The annual value being established, it remains to ascertain the period from which it ought to commence; and this, in our opinion, must be the date of the judicial demand, as the defendant may have been a possessor in good faith, until that time, of the whole tract of land. It appears by the record, that a citation was served on January 15, 1818, and final judgment rendered in April, 1820; consequently the plaintiff is entitled to rent for the space of two years and three months, which amounts to forty-five dollars.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and proceeding here to give such judgment as in our opinion ought there to have been given; it is further ordered, adjudged and decreed, that the plaintiff and appellant do recover from the defendant one half of the tract of land in dispute, agreeably to the verdict of the jury, and the report of the experts who

were appointed by order of the court below, East'n District.
 to divide the land between the parties litigant. May, 1822.
 It is also further ordered, adjudged and decreed, that said plaintiff and appellant do recover the sum of forty-five dollars for rent of said plantation, and costs in both courts.

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APPEAL from the court of the first district.

The plaintiff *in propria personâ*. The plaintiff, on the 18th October, 1821, shipped at Pensacola, on board of the sloop Herald, commanded by the defendant, three boxes of books, in good order and well conditioned, to be delivered in New-Orleans. The sloop sailed on her voyage towards dusk of the same day; and about 9 o'clock that night, there being no pilot on board, while sailing out of the bay, the defendant placed one of the passengers, J. B. Forster, at the helm, that he might go forward to view the land; being unable to discern it, owing to the darkness of the night, returned to the helm, and requested him to go forward for that purpose. The vessel had already approached so near the land, that

The master of a vessel is liable for *levissima culpa*.

The master of a packet between Pensacola and New-Orleans, not drawing more than five feet water, is not bound to take a pilot.

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while the passenger was looking out forward, but unable to direct the defendant at the helm, he himself, from the quarter deck, discovered his danger; ordered the peak to be struck; but before his orders were obeyed, and the course of the vessel could be changed, she ran ashore on the Caulker's shoal near the Barrancas, at the entrance of the bay of Pensacola. In order to lighten the sloop for the purpose of getting her off, the defendant judged proper to discharge part of her cargo, among which he included, without the consent of the plaintiff, two out of his three boxes of books, weighing about 200 lbs. each: they were carried on to the beach, about 200 yards from the vessel, and put one on billets of wood, the other on some of the cargo, and about ten yards beyond high water mark; instead of placing them on high land, where they could never be reached even by the spray of the sea, in case of a storm.

Five days after the cargo had been landed, it blew hard and the surf beat up against some of the goods: by which it is supposed, for there is no positive evidence on the subject, that the two boxes of books were damaged. The sloop, however, got off, without any damage;

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proceeded to New-Orleans ; where the boxes were surveyed in the store of B. Levy, by the port-wardens, who finding the books in two of them damaged by salt water, ordered a sale thereof at public auction in due form of law : which being done, a loss accrued amounting to \$629 63 : for the reimbursement of which sum the present suit has been instituted by the plaintiff, who alleges that the damage happened from the carelessness and culpability of the defendant.

The judge below, to whom this cause was submitted on the evidence now on record, considered that the defendant, as a common carrier, was bound only to take ordinary care of the goods intrusted to him, and that he could not be charged for the damage, which, by a slight degree of negligence, had been caused to the books, as he conceived, from the beating of the spray, on the rising of the storm, and therefore, gave judgment for the defendant.

That the court erred in the principle of law, on which the case was decided ; and has drawn an incorrect conclusion from the evidence, is what the plaintiff now calls upon this court to determine, and which he will endeavour to shew most conclusively.

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It may be premised that the rule of decision in this case, is not to be taken from any statutory provision of this state, but must be drawn from that branch of the law of nations usually termed *Lex Mercatoria*, which is recognised in all commercial states, and is to be collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of. 4 *Blac. Comm.* 67. 1 *Blac. Comm.* 273. 1 *Marshall on Insur.* 19.—*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac : sed et omnes gentes, et omni tempore, eademque lex obtinebit.* Let us then investigate among the writings of approved authors, what is the degree of care and diligence required from masters of vessels; for what faults and omissions they are responsible, and in what way they can excuse themselves for damage done to goods committed to their charge.

The Spanish writers inform us that the master of a vessel is responsible for damages, whenever he has not discharged the functions of his employment with due diligence. The slightest fault committed by him, or the omission of that which the most diligent in his art, with the most exact diligence, could perform,

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render him culpable, and put to his charge every damage arising therefrom. *Finalmente se tenga por regla ser a cargo del maestro los daños que sucedieren por su culpa,—no haciendo lo que es á su cargo con la diligencia debida. Sobre lo qual es obligado de la culpa levisima, no haciendo lo que el diligentísimo en este arte hace, par la exactísima vigilancia, y diligencia, que en el se require, como lo dicen algunos autores, y en particular Sylvestre, Gregorio Lopez, y Straca, por un texto.—Curia Philipica, Comercio Naval, lib. 3, cap. 12, Daños, n. 30, 509. Exercitor qui recepit, tenetur de levisima culpa, says Gregorio Lopez, gloss. 9 & 10, Part. 5, 8, 26. See also 3 Curia Philipica, Illustrada, 314; where we are informed what is understood by the words just quoted.—Levisima culpa es la negligencia de aquello que los diligentísimos suelen alvidar. The text of the Roman law referred to in the Curia, is found ff. 19, 2, 25, 7, and is as follows:—*Qui columnam transportandam conduxit, si ea dum tollitur aut portatur, aut reponitur, fracta sit, ita id periculum præstat, si qua ipsius eorumque, quorum opera uteretur, culpa acciderit: culpa autem abest, si omnia facta sunt, quæ diligentissimus quisque observaturus fuisset. Idem scilicet intelligemus, & si dolia vel tiguum transportandam aliquis conduxerit. Idemque etiam**

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ad ceteras res transferri potest. In France the same doctrine is established: *Le capitaine est un mandataire à gage, qui répond de la faute très légère. Si le capitaine n'a pas prévu ce qu'il aurait dû prévoir, il est en faute. Il est en faute, s'il a failli par ignorance de son art. Le capitaine est tenu de tous les dommages qui arrivent à la marchandise par sa faute; car il doit rendre la marchandise telle qu'il l'a reçue, à moins que le dommage ne procède d'un accident qu'on n'a pu ni prévoir, ni empêcher.* 1 Emerigon, 373, 377.

C'est au maître du navire que sont confiées les marchandises qui y sont chargées; c'est donc à lui à en répondre, sauf les accidents maritimes non procédant de son fait ou de sa faute, ou de ses gens. Il est tenu de toute faute procédant de son fait ou de sa négligence, même de la faute appelée très légère; de manière qu'il n'y a que le cas fortuit qui puisse l'excuser. Et c'est à lui à prouver le cas fortuit. 1 Valin, 394. What is to be understood by le cas fortuit, is most luminously expressed by Emerigon: On appelle cas fortuit, says he, les événements que la prudence humaine ne saurait prévoir. *Fortuitos casus nullum humanum concilium providere potest.* Lib. 2, sec. 7, ff. de admin. rer. ad civil, Liv. 6. C. de pignor act.

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 L. 15, sec. 2, ff. locati. L. 25, sec. 6, ff. cod. May, 1822.

Ces deux points se confondent. On entend par cas fortuit une force majeure qu'on ne peut prévoir, et à laquelle on ne peut pas résister, & cui præcaveri non potest. Cujas, sur la Rubrique du code, de locato. Casarégis, disc. 23, n. 38. Straccha, gl. 22.

Il suit de cette définition que tout cas qu'on a pu prévoir et éviter, n'est pas fortuit. Ubi autem diligentissimus præcavisset et providisset, non dicitur proprie casus fortuitus. Santerna, part. 3, n. 65.

Il y a une grande différence à faire entre cas fortuit, et cas imprévu. La perte, qui arrive par l'imprudence ou l'impéritie du capitaine, est imprévue, mais elle n'est pas fortuite : *improvisus casus dicitur qui solet imprudentibus contingere.* Santerna, d. locc.

En un mot, on ne met dans la cathégorie des cas fortuits que ceux qui arrivent malgré toute la prudence humaine ; *quod fato contingit, et cuivis patrifamilias, quamvis diligentissimo possit contingere.* L. 11, sec. 5, ff. de minorib. 1 Emerigon, 358.

These principles of Valin and Emerigon, two of the most illustrious writers on commercial subjects, who have flourished in any age.

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have been consecrated in France, by the
Code de Commerce, art. 221 and 230.

Tout capitaine, maitre ou patron, chargé de la conduite d'un navire ou autre bâtiment, est garant de ses fautes, même légères, dans l'exercice de ses fonctions.

La responsabilité du capitaine ne cesse que par la preuve d'obstacles de force majeure.

The Italian, and other writers, maintain the same doctrines, as we are informed, 3 *Curia Philipica, Illustrada*, 314; *Casaregis assegura que el maestro esta obligado por qualquiera culpa, sea lata, leve, o levissima. See Casaregis, Disc. 19, n. 31, 34, Disc. 23, n. 60, 63, and Disc. 122.—Stypman, Part. 4, tit. 15, n. 322, 556, says expressly, Venit in hanc actionem ex contractu magistri navis, non solum dolus et culpa levis, sed etiam levissima: solum casus fortuitus excipitur.—The English and American jurisprudence on this point is well settled, and must be familiar to the court.*

Abbott, Part. 3, ch. 3, n. 9, states, that the master must, during the voyage, take all possible care of the cargo; by the general principle of the law, the master is held responsible for every injury that might have been prevented by human foresight or care; and

that he is responsible for goods injured in consequence of the ship sailing, in fair weather, against a rock or shallow, known to expert mariners. *Marshall on Insurance*, 241, states, that it is the policy of the law to hold the master responsible for all loss or damage that may happen to the goods committed to his charge, whether it arise from the negligence, ignorance, or wilful misconduct of himself or his mariners, or any on board the ship. As soon therefore as goods are put on board, they are in the master's charge, and he is bound to deliver them, again in the same state in which they were shipped; and he, as well as the owners, is answerable for all loss or damage they may sustain, unless it proceed from an inherent defect in the article, or from some accident or misfortune, which could not be foreseen or prevented. In the American edition of *Jacobson's laws of the sea*, at p. 88, the editor, in a note, has given a summary of the law as held in the united states. "The courts in this country have always considered masters of vessels liable, as common carriers, in respect to foreign as well as internal voyages. In an action against a master or owners for loss or injury to goods, the enquiry

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is not whether the injury proceeded from the default or neglect of the master, but whether this injury has resulted from any of those causes which form exceptions to their liability; for if it has not resulted from such causes, whether it be owing to the master's neglect, or not, is of no importance; neglect or default will be presumed.

In a suit for indemnification against this species of neglect, it is enough to prove the article in good order when delivered to the defendant, and that it was otherwise, when received from him: and it is said, evidence of care on the part of the defendant, ought not to be admitted." *Lex Merc. Am.* 178.

In a case decided by the supreme court of the state of New-York, 10 *Johns. Rep.*, *Elliott vs. Rossell*, the whole doctrine of the law on this subject, is ably discussed by the chief justice, Kent; and after an investigation of much learning and research, is luminously expounded, and authoritatively settled—from the argument of this profound judge, I will make a few extracts.—“It has long been settled, says he, that a common carrier warrants the safe delivery of goods, in all but the excepted cases of the act of God, and public

enemies; and there is no distinction between a carrier by land, and a carrier by water.—Masters and owners of vessels are liable as common carriers, on the high seas, as well as in port; in short, it must be regarded as a settled point in the English law, that masters and owners of vessels are liable in port, and at sea, and abroad, to the whole extent of inland carriers. The marine law is essentially the same, and holds an equally strict control over the master; and upon the same principle of public policy, a master of a vessel, or common carrier, by the almost universal law of nations, as well as by the common law of England, is chargeable for all losses not arising from inevitable accident. If, therefore, according to *Roccus*, a theft be committed on board, the master is answerable, like an innkeeper, though the loss happen without his fault. So if the ship strike on a shoal, unless it be by the violence of winds or storms, he is liable, because he did not provide against an accident which a careful navigator would have foreseen. So he is liable if he does not conduct the voyage with a due regard to the circumstances of the ship, time and place, and the practice of skilful navigators. *Roccus, n.*

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East'n District. 40, 55, 56. *Emerigon*, tom. 1, 373, 377, says,  
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it is so difficult to discover the faults of a master of a vessel, that he is responsible for every slight negligence. He is in fault, if he has not foreseen what he ought to have foreseen, with due diligence. In short, he says the master, in consequence of his compensation, is answerable for all damage which the cargo receives, unless it proceeds from an accident which he could not foresee or prevent. *Va-lin* declares expressly, tom. 1, 394, that nothing but the *cas fortuit*, will excuse the master of a ship from responsibility for a loss.—The rule applies, in the *French Code*, equally to carriers by land, and by water. We must, therefore conclude, that there is nothing peculiar on this subject, in what is termed, in English law, the custom of the realm; for the marine law lays down the rule against carriers with essentially the same strictness or severity of sanction.

The civil law, the source, in this instance, of the marine law, was equally guarded, and placed masters of vessels, and inn-keepers under the same responsibility. They were held liable, under an edict of the prætor, for every loss happening without their fault, that

did not happen *damno fatali*; or, as Voet expresses it in his Commentaries, *exceptio est sola, quod damno fatali aut vi majore, veluti naufragio aut piratarum injuria, perisse constat*; and he says, that, except as to the penalty, the rigour of the rule continues to this day, in the Dutch jurisprudence. *Dig. 4, 9, sec. 1, and 3, Dig. 47, 5, sec. 1 and 3, Voet's Commentaries, h. t.* The reason given in the civil law, for the rule is, that it was necessary to confide largely in the honesty of these people, and to give great opportunities to commit frauds which it would be impossible to trace. And this strict rule has no doubt been as generally adopted, and as widely diffused, as the Roman law. *Erskine (Institutes, 452, pl. 28, 29,)* says, that the edict of the prætor is, with some variations, adopted into the law of Scotland. Indeed, we find the rule stated in precisely the same terms, in the ancient usages of a country, into which we do not know that the Roman law ever penetrated. "If a load be damaged by a carrier's fault, whatever is lost, he shall be compelled to make good, unless this injury happen by the act of God, or of the king, and whatever does not so happen, denotes a fault." *Colbrooke's Digest of Hindu law, vol. 2, 372, 374.*

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The courts in this country have always considered masters of vessels liable as common carriers, in respect to foreign, as well as internal voyages. In *M-Chure vs. Hammond*, 1 *Bay's Rep.* 99, the defendant undertook to bring a quantity of tobacco for the plaintiff, from Augusta, in Georgia, to Charleston, and the vessel was driven ashore on the coast, during the voyage; and as the loss did not appear to have arisen from inevitable accident, he was held liable as a common carrier.

These authorities which might have been extended much further, establish conclusively, I presume, the principle of law which I advanced, in opposition to the rule of decision assumed by the judge *a quo*, in his judgment, that the master of a vessel is bound to take ordinary care only of the goods entrusted to him.

Let us now examine the facts of this case, and from an analysis of them, draw that conclusion which will be in conformity with the law just laid down.

1. The defendant sailed from the port at dusk, and proceeding down the bay, during a very dark night, when the land could not be discerned, without a pilot, attempting to put

to sea: having overrun his reckoning, the vessel grounded on the Caulker's shoal. All this was imprudent, not to say more; in such a state of things a careful captain would have cast anchor until morning, and then he could have proceeded to sea without risk.

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2. The defendant transported the goods of the plaintiff, without his consent, from the vessel on to the beach; and there placed them at only a distance of ten yards from high water mark. The weight of the two boxes did not exceed 400 lbs., and could not have hindered the vessel from floating off the shoal, when lightened by taking out such part of the cargo as was not liable to damage. The defendant was informed when these boxes were put on board, that they contained books, and should therefore have taken such care of them as would secure them from water. The box left on board of the sloop was not injured; the other two would not have experienced any damage, had they remained with that part of the cargo which was not moved.

3. When the defendant took upon himself to select the two boxes of books, knowing their contents, he should have provided effectually against every damage which might be

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caused to them by the surf of the sea; every measure should have been taken which human foresight could suggest for their preservation. They should not have been left so near the edge of the sea, on the beach; but removed to high land, during the five days which intervened from the time they were landed, until the surf beat up about them.

Conceding to the defendant that he was without culpability in attempting to go out to sea during a very dark night, without a pilot, and that the vessel grounded through an error of reckoning on his part; how can he excuse himself for the want of foresight; the imprudence in placing books so near the edge of the sea; which he knew was so liable to be agitated and raised by storms? But has the defendant, on whom the burthen of proof lies, shewn by what means the books were damaged? That the damage which they did experience, could not have been prevented by any human foresight? Has the defendant, in a word, brought himself within the exceptions which will excuse common carriers for a damage done to the goods committed to their charge? I think this court will answer in the negative, and render a judgment against the

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defendant for the reimbursement of the loss experienced by the plaintiff.

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*Eustis*, for the defendant. This is a hard action against a person to whom no fraud or negligence can be imputed. I ask the opposite counsel to put his finger on any part of the record which proves the defendant's negligence. No fault has been committed: nothing left undone which the most careful master would have thought of.

The plaintiff accompanied his goods; they were under his immediate care.

The packet set sail in the afternoon. Neither the plaintiff, nor any other passenger, made the smallest objection to her going to sea at that time. American captains do not, like the Spanish, take in their sail at night, and go to prayers. It is proven that it blew fresh, by one witness, and said by others, that the defendant overran his reckoning. The navigation is difficult. There was no particular necessity of taking a pilot. The ordinance of the port of Pensacola, relative to pilotage, requires only vessels of a larger draft than that of the defendant, to take a pilot.

The defendant acted prudently in sending

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the plaintiff's goods ashore. He would have been liable if he had suffered them to remain on board, when he had time to land them, and they had perished.

It blew a hard gale when the goods were placed on the beach, and the presumption was, that the waves had reached the highest point.

We have shewn a *force majeure*, a tempest—he cannot shew more.

Spanish law has nothing to do with this case. It is to be governed by our own laws. Although the contract was made in Pensacola, it was to be executed by the delivery of the goods in this city. The essence of the contract was their delivery. The packet belonged to New-Orleans. Both parties were inhabitants of New-Orleans. In a matter of doubt, these circumstances must have weight. The parties must not be presumed to have contracted with reference to the laws of Pensacola. Suppose five per cent primage to be allowed by these, could they have been recovered here?

I quote 1 *Johns.* 93, to shew that a note made in France, payable here, is good without a stamp; our courts not noticing the revenue laws of other countries. What was the

essence of the contract ? Payment in America. East'n District.  
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Here it was the delivery of goods in Louisiana. Let the gentleman distinguish that case, if he can, from this.

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In 4 *Johns*. 289, is a case to the same point. This is the general law on the subject.

The cases of 7 *Martin*, 213, and 4 *id.* 582, can be easily disposed of. The court never has had the point directly before it. In the first, the reason why the court gave the privilege was, that delivery was not of the essence of the contract of sale. The other was a case of jettison; the obligation of the party arose from a contingency; the throwing out of the goods at sea. There was no contract on that subject, and when the question arose, what law should govern, the court held that it could not be supposed that citizens of New-York had the laws of Louisiana in contemplation. If that contract had been to be executed in Louisiana, the decision would have been as I contend for, and the opinion of the court supports my conclusion.

In *Hampton vs. brig Thaddeus*, the court decided rightly; because the point was not made and no law was proven.



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MARTIN, J. delivered the opinion of the court. We agree with the plaintiff, that the master of a ship is liable for *levissima culpa*. So that the question before us is only one of fact: was the defendant guilty of any neglect or fault?

The plaintiff urges that he was, 1. In sailing from the port at dusk, and proceeding down the bay, during a dark night, without a pilot.

2. In transporting the goods on shore, without the plaintiff's consent, and placing them on the beach, at a short distance from the water.

3. In selecting the boxes, which contained the books, to be landed, and suffering them to remain long on the beach.

I. The evidence shews that the defendant "attempted to go out of the bay, the evening of his departure from the town of Pensacola." The inference is strong, that he sailed in the day time. Nothing on the record enables us to ascertain the distance between the anchorage before the town, and the entrance of the bay. We are unable to cross-examine the witness, in order to discover whether the

place was a proper one to cast anchor in; whether the extreme darkness of the night, and freshness of the wind, which are presented as the cause of the vessel getting aground, did not come on suddenly.

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The evidence before us shews, that although the entrance of the Barrancas be difficult, "vessels that commonly ply between New-Orleans and Pensacola, are not in the habit of employing pilots, either in coming in, or going out of Pensacola bay—that after two or three trips, captains are as capable of safely conducting their vessels, as any pilot, provided they be of a small draft, say, five or six feet;" that the defendant's vessel is a regular packet, plying between New-Orleans and Pensacola, and captain Munroe, in the deponent's knowledge, has been several times the same voyage; and the regulations of the port of Pensacola, do not require a pilot to be taken by vessels drawing not more than five feet water.

Jacobson holds, that coasting vessels are not bound to take pilots. *Sea Laws.*

II. The landing of the cargo, appears to have been a measure of necessity; we do not

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know that the defendant was bound to consult the plaintiff, who, however, does not shew that he made any objection.

The testimony does not warrant the conclusion, which is endeavoured to be pressed on us, that the goods were carelessly left at too short a distance from high water mark.— The evidence is, that “it blew hard, and rained the whole time they were engaged in landing the cargo, and after.” The manner in which the security of the cargo was provided for, is minutely detailed, and shews considerable care. It is sworn that “captain Munroe worked constantly, and made use of every possible exertion to get the sloop off, and took as much care of the cargo, while on shore, and disposed of it as judiciously as any man could have done.” It is shewn that extreme difficulty was experienced, in landing and bringing back the cargo on board, owing to heavy winds and a high sea.

From all this, we are bound to infer, that the plaintiff's boxes were put at such a distance from high water mark, as the hurry the crew were in, permitted. It appears the spot they were placed in, proved a safe one during the storm, which prevailed while they

were brought ashore, and they were engaged during a second, and more violent storm, which no evidence enables us to say, could have been foreseen.

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III. We are unable to discover that the violence of the storm left the defendant at liberty to make any selection, as to the part of the cargo which was first to be carried on shore; and the testimony shews, that "the crew were kept constantly at work, in endeavouring to get the vessel off"; which precludes the idea, that any part of the cargo was unnecessarily left ashore, while it could have been safely brought back on board.

When it is considered that the plaintiff was on board, with a very near relation, by affinity, who had had the care of the books in Pensacola, and had himself delivered them to the defendant—that this person has been examined as a witness, it may be concluded that no circumstance which may avail the plaintiff has been omitted to be proven. Yet the case enables the defendant to shew that he did what could be expected from him.

We believe the captain took a proper care of the goods, after the vessel got aground.

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The only doubt with us has been, whether the coming out of the bay at night was justifiable. It is shewn that vessels, drawing not more than five feet, are not bound to take a pilot; and although it is said, that in extreme freshes, vessels drawing nine feet come into the canal Carondelet, the presumption is, that a packet plying between Pensacola and New-Orleans, is of such a draft as will enable her to come in the ordinary height of water, which does not exceed six feet; so the captain, not being bound to take a pilot, was only bound to use the same care as a pilot, and is only chargeable as a pilot would be, in the present case.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

**MILLAUDON vs. NEW-ORLEANS INSURANCE
COMPANY.**

The presence of the owner is not conclusive evidence of his assent to any act, which is alleged to constitute barratry.

When proof is once given of

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. The petitioner avers, that he made advances for the outfit of the brig Two Cathe-

rines; that for his reimbursement, François Ducoing, then the owner of the said brig, assigned and transferred to him, the freight to be earned on a voyage which she was about to make from New-Orleans to the port of Havre de Grace, in France; and that said Ducoing caused said freight to be insured at the office of the New-Orleans Insurance Company, to the amount of one thousand dollars, and duly assigned to him the policy.

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He further avers, that the said brig did sail on the voyage mentioned in the policy of insurance, and that the freight to be earned was totally lost by one of the perils insured against, *viz.* by the barratry of the master and mariners.

The defendants pleaded the general issue. There was judgment against them, and they appealed.

Among other facts agreed upon between the parties, it is material to state those which follow:—

The vessel was cleared at the custom house on the 11th October, 1817, by John Ducoing, the brother of the insured captain. The insurance was executed the same day. François

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Ducoing, the owner, on 13th of that month,* transferred and set over all his right, title and interest, in the brig Two Catherines, to one Raymond Espagnol, and on the same day assigned his interest in the policy to the plaintiff.

The vessel sailed with Raymond Espagnol, who continued on board during the whole voyage, on which the barratry is charged to have been committed. Her loss, together with that of the cargo and freight, was occasioned by the fraud of the captain and crew running away with, and disposing of brig and cargo, in fraud of the shippers and owners.

The question presented is, whether on the admission just stated, that the loss was occasioned by the fraud of the captain and mariners running away with the vessel, the circumstance of the owner being on board, does not so change the offence as to preclude us from considering it an act of barratry?

Barratry is defined by *Marshal*, an act committed by the master or mariners, for an un-

* This is the date of the assignment according to the agreed case—the indorsement on the policy is of the following day: the 14th.

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lawful and fraudulent purpose, contrary to their duty to the owners, and whereby the owners sustain an injury. 2 *Marshal*, 515.

The chief justice of Pennsylvania, in a very able opinion, after reviewing all the cases on the subject, states it to be any trick, cheat, or fraud practised by the captain, to the prejudice of the owners—any crime committed to their prejudice by the captain. 2 *Marshal*, 534, *in notis*.

There is danger in trusting to general definitions, because there is great difficulty in compressing into a single sentence, or explaining by a few words, the various circumstances which constitute an offence, or confer a right, or in designating exactly before hand, what cases come within the general rules established for the administration of justice. It is possible therefore, that neither, or both those quoted, convey accurately the idea attached to the word barratry; but on one point there is no doubt; if the act complained of, was committed with the consent of the owner, it cannot be considered as constituting that offence.

That consent, it has been argued, is proved here, because the owner was on board. This

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does not appear to us, by any means, so necessary an inference, as to deprive the plaintiff of that right to recover, which the other facts in the case clearly establish. In examining cases of this description, we must always keep in mind, that when proof is once given of any act which amounts to barratry, the *onus* of establishing every fact that goes to excuse it, is thrown on the insurer. 2 *Marsh.*, 531. The evidence which discharges, must at least be as strong as that which creates the liability. Here the circumstances that make out a case of barratry, are fully admitted, and the consent of the owner, which is to do away the effect of these circumstances, is left to be inferred: or at best, is proved by nothing more than presumptive evidence—this is not sufficient. A deviation, amounting to barratry, might frequently be committed during a voyage, without the knowledge of the owner, though on board, if he did not possess nautical skill; and it is quite possible that the master and mariners, may have run-away with the ship against his wish. Such cases we know have happened, and we do not know this is not one of the same kind.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

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Grymes for the plaintiff, *Workman* for the defendants.

—
DUFOUR vs. CAMFRANC.*

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This case has been already before the court, and was remanded in order that further proof might be had of a fact deemed material to a correct decision of the matters in dispute—the former proceedings are fully reported. 8 *Martin*, 235.

To the title alleged and proved by the plaintiff, the defendant pleads, that he is the owner of the slaves sued for; that he purchased them at a sheriff's sale made in virtue of an execution issuing from a court of competent jurisdiction, in pursuance of a judgment

The validity of a sentence, rendered by a court of competent jurisdiction, cannot be enquired into collaterally.

The decree which such a tribunal renders directly on the point reviewed, is as a plea, a bar, or evidence, conclusive between the same parties, or those claiming under them, for the same thing.

A forced alienation results from a sale made at the time, and in the manner prescribed by law, in virtue of an execution issuing on a judgment already rendered by a court of competent jurisdiction. If a sale is made where these re-

* This case was decided at April term last; but the judgment was not printed with those of that term, because it was suspended by an order for a rehearing. See *Post*, June term.

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quisites are wanting, the purchaser does not acquire the "right, title and interest" which the debtor had in the thing sold.

Laws which deprive men of their property, without their consent, should be strictly pursued.

When an alienation of property is not expressed in the instrument, it must clearly result from the act.

If proceeds arising from property irregularly sold at sheriff's sale, have been applied to the payment of the owner's debts, he cannot recover the property until he repays the purchaser the amount.

rendered against the heirs of one Victor Dufour; and that the plaintiff is one of those heirs.

It is replied, that the judgment, under which the defendant claims, was null and void, by reason of the defendant not being cited, and because other proceedings were omitted which are necessary to render it valid; that supposing it to be regular, the writ of *fieri facias* did not pursue it—that the deed offered by defendant shews that the sale was in virtue of an execution reciting another, and different judgment, which judgment is not produced.

The first question then presented for our decision, is the regularity of the judgment in virtue of which it is stated the property was sold.

We are of opinion that the validity of a sentence, rendered by a court of competent jurisdiction, cannot be enquired into collaterally, as is attempted here. The decree which such a tribunal renders, directly on the point reviewed, is as a plea, a bar, or evidence, conclusive between the same parties, or those claiming under them, for the same thing. The errors complained of, were questions for the decision of the court which tried the cause,

and we have no authority in a case arising between the same parties, to examine how they were decided, unless regularly brought before us by an appeal, or by an action of nullity, if that remedy still exists. An act of the legislature has limited the period for bringing up causes to this court, and the Spanish jurisprudence requires, that where judgments are sought to be annulled, by an action, expressly given for that purpose, suit must be brought within a certain time. Now, if the party, instead of attacking the judgment, should be permitted, after the delays are expired, to sue for the object acquired under it, it is evident the regulations just alluded to, would be completely evaded. And it would be strange if the plaintiff could, in any case, successfully allege nullity in the replication, when an averment of the same kind would not be listened to in the petition.

The regularity of the proceedings, therefore, in the cases of *Turgeon*, and *Camfranc vs. the heirs of Dufour*, up to the time of rendering judgment, cannot be enquired into in this case.


But the measures taken under that judgment, to obtain the benefit of it, present an entirely different question. The authority of

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a judicial decree does not prevent us from examining their correctness. And the plaintiff, on establishing that he, or his ancestor, once owned the slaves claimed, has a right to obtain judgment for them; unless the possessor shews, either a title by prescription, the owner's consent to transfer them, or a forced alienation, which stands in place of that consent.

A forced alienation results from a sale made at the time, and in the manner prescribed by law, in virtue of an execution issuing on a judgment already rendered by a court of competent jurisdiction. If a sale is made where these requisites are wanting, the purchaser does not acquire the "right, title and interest" which the debtor had in the thing sold. *Curia Philipica*, P. 2, *Remate*, n. 27. *Febrero*, cinco juicios, lib. 3. cap. 2, sec. 5. n. 352 & 357. 4 *Martin*, 573. Has such an alienation taken place in the case now before us?


The defendant insists that it has, and produces in evidence, a conveyance made to him by the former sheriff of the first superior court district, of the late territory of Orleans, in which it is recited, that by virtue of a *feri facias*, issued at the suit of J. B. Camfranc and

others, against the heirs of Victor Dufour, he had sold the slaves claimed in the present action. No such judgment, however, being produced as that of *Camfranc and others vs. the heirs of Dufour*, we must hold that none exists, and that the sheriff, in making the sale, acted without authority.

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The appellee's counsel have, however, strenuously contended, that it is evident the sheriff meant the suits of *Camfranc vs. Dufour* and *Turgeon vs. Dufour*. But we cannot so understand it, for he has not said so, and we are not permitted to supply by intendment, what is wanting in an instrument of this kind. Much less can we say that the sheriff, in this case, sold under executions issuing in several suits, when he explicitly states, that it was in virtue of a *fieri facias*, at the suit of J. B. Camfranc and others. Laws which deprive men of their property, without their consent, should be strictly pursued by those who seek the benefit of them. 4 *Wheaton*, 77. The act of our legislature requires that the judgment on which execution issues should be recited in the deed of sale given by the sheriff. 2 *Martin's Dig.* 336. That has not been done here; the consequence is, that the buyer has not a conveyance in

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pursuance of the law under which he purchased, and is, therefore, without title.


It is urged that the plaintiff has ratified this sale. This point received the serious consideration of the court on the former hearing. Before the particular instrument, which is said to contain the ratification, is considered, it is necessary to state the following facts :—

The brother of the present plaintiff, D. Victor Dufour, died in St. Jago-de-Cuba. On his death, Laroque Turgeau took charge of his property, and in conjunction with one Carrier D'Outremer, brought the slaves claimed in the petition, to Louisiana. Shortly after their arrival here, they were attached at the suit of J. B. Camfranc, and of Laroque Turgeau, and judgment was given in both cases, for the plaintiffs; execution issued, and as it appears from the sheriff's return, a certain sum of money was made on each.

Laroque Turgeau died in Jamaica. D'Outremer, as his attorney in fact, had received the monies recovered in the suit against the heirs of Dufour. The plaintiff is heir, as well of Turgeau as Dufour. On arriving in this country he commenced the present action, and some time after bringing suit, being em-

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barrassed in his affairs, he applied to D'Outremer for the monies held by him, as agent for Turgeau, and on executing a receipt, was paid over the sum of \$1560. Whether he received this money as heir of Laroque Turgeau, does not appear by the receipt, and is not expressly proved by the other evidence in the cause; but from all the facts of the case, there is a strong presumption, that he did receive it in that character.

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As soon as the present action was commenced, the defendant obtained an injunction, by which Carlier D'Outremer was inhibited from making any disposition of the sum he had received as agent for Turgeau.

The particular expressions of the receipt require to be stated. It acknowledges \$1560 to be paid, and that the money belongs to the succession of Laroque Turgeau, and also contains an engagement, that by reason of certain injunctions having issued, enjoining D'Outremer from paying the money, one at the suit of Camfranc, and the other on the demand of one Lafitte, the amount received shall be returned, in case the said injunctions should be made perpetual.

Under these circumstances, the defendant

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insists that the plaintiff cannot recover the property sold.

This position, it is believed, cannot be maintained. The plaintiff's right must be destroyed by some act which renounces his title, or conveys it to another. When it is attempted to shew this, by an instrument which does not express such an intention, common sense as well as law, requires that it should clearly result from the act. Had the appellant, as heir of Turgeau received unconditionally the money from D'Outremer, it might perhaps have been argued that he intended to abandon all right he had to the slaves, which he was then suing for. But when, in the very receipt he alludes to the injunction issued, in consequence of his suit against Camfranc, and promises to pay the money back if that injunction be confirmed, or in other words, in case he succeeds in the present action; it surely cannot be urged he intended to renounce a claim, the ultimate recognition of which is made a condition of his repaying the amount received. Sufficient weight was perhaps not attached to this promise, to return the money when the case was formerly before the court.

On the whole, we are of opinion that the

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defendant has not shewn a legal title to the property sued for.

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Another question still presents itself. It has been proved that the proceeds arising from the sale of the slaves were applied to the discharge of the judgment debts of the plaintiff, and the court is of opinion that he cannot recover in this suit, until he repay that money. This is the doctrine expressly laid down by *Febrero, lib. 3, cap. 2, sec. 5, n. 357*. And we readily adopt it; for nothing could be more unjust than to permit a debtor to recover back his property, because the sale was irregular, and yet allow him to profit by that irregular sale, to discharge his debts.

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It is unnecessary to notice particularly the bills of exceptions taken on the trial, as the opinion now expressed, meets and answers the questions of law raised by them.

After the cause has been litigated for such a length of time, it is to be regretted that we cannot now make a final disposition of it.— But it has not been proved what the services of the slaves were worth, and it is necessary to ascertain that fact, to enable us to decree what sum shall be paid by the plaintiff; the case must therefore be remanded for a new



East'n District. trial on this point alone, and the appellee  
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~~~~~ pay the costs of this appeal.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that this cause be remanded for a new trial, with directions to the judge to ascertain what the services of the slaves were worth, and that the appellee pay the costs of this appeal.

Livingston for the plaintiff, *Moreau* for the defendant.